

# Rethinking innovation, development and intellectual property in the UN: *WIPO and beyond*

Sisule F Musungu



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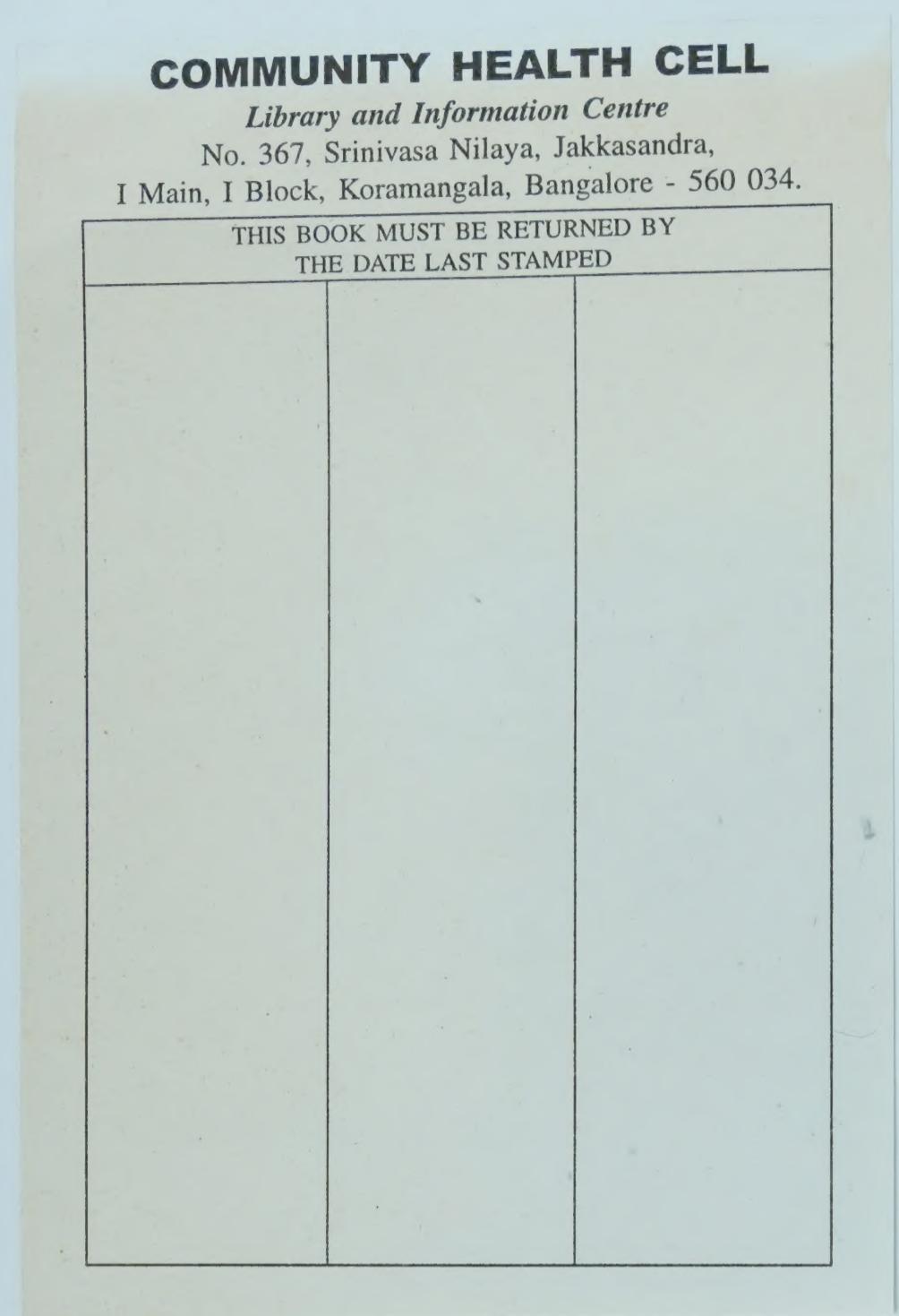
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## About these papers

In these issues papers, individual authors are invited to examine a subject of importance in the developing international intellectual property regime and highlight the key issues they see arising. The topics have been chosen following consultations with negotiators from developing countries and respond to their concerns. Our aim is to contribute to a greater understanding of the impact of changes in this area upon people's lives and better inform debate and negotiations.

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# Summary

The Millennium Project's Task Force on Science, Technology, and Innovation has concluded that:

"International institutions urgently need to realign their activities to reflect the technological requirements for implementing the Goals [Millennium Development Goals]. This effort will not only help deploy available financial and other resources to meet the Goals, it will also help identify gaps in available resources. These efforts need to be undertaken in the context of a better understanding of the sources of economic growth. The five-year review of the implementation of the Goals offers a unique opportunity to start this reconceptualization process."<sup>1</sup>

This paper aims to contribute to this reconceptualisation process. The discussion focuses on how the mandates and competencies of key UN institutions relevant to innovation, development, and intellectual property can be brought to bear in addressing the challenges of the 21st century knowledge society. The fundamental question being: what should be the governance architecture and the rules for the generation, use and regulation of technology and knowledge in a globalised world?

Although the UN has a wide ranging mandate to address these issues, the overall approach in the last two decades has been disparate. The fiction that organisations such as WIPO specialise in intellectual property and by default are in charge of designing the type of business regulation for innovation and technology markets has taken root resulting in serious consequences. This is why WIPO should not be the only, nor even the lead, UN agency dealing with intellectual property matters. Deciding on the shape and structure of the regulatory regime for innovation and intellectual property, the detailed rules that shape it, the balance of interests to be met and the measures by which it is judged requires a far wider range of inputs than those from legal and technical groups that make up the intellectual property community and which dominate the practice of WIPO.

The world now faces a range of challenges in governing the knowledge society and particularly the issues related to innovation, development and intellectual property. Among others, these challenges include: the principle of minimum intellectual property standards backed by trade retaliation; the loss of balance in intellectual property policy and rules; the incumbency problem; lack of economic analysis: *fighting rather than embracing new technologies such as the internet; undemocratic and ideological international standard-setting*

processes; inconsistency and lack of coordination within and among developing countries; and glossing over historical evidence and lessons.

Critical first steps in dealing with these include: implementing the WIPO development agenda coupled with deliberate measures to position the other agencies to provide substantive contributions; having a coordinated engagement in issues of innovation, development, and intellectual property; and, amplifying their role at the national level.

The following set of priorities and milestones are important parameters in moving forward the debate and action on reforming knowledge governance and rethinking the role of the UN in that process:

- The idea of specialisation in the UN over intellectual property must be radically rethought. In particular, it will have to be clearly understood that while WIPO has a role to play and its reform is important, such reform is insufficient to address the challenges of innovation, development, and intellectual property in the 21st century;
- The challenges highlighted in Part 2 of this paper as well as other related challenges will have to be better understood not only by institutions such as WIPO but more broadly by all relevant UN entities and by countries, especially developing countries;
- The key proposals in the WIPO development agenda examined section 3.1 will have to be vigorously pursued and implemented within the next 5 years at the latest if WIPO is to contribute more usefully to achieving the MDGs by 2015;
- The reform of the UN and the review of the MDGs implementation will have to result in better substantive outputs, coordinated engagement of the UN entities on the issues of innovation, development, and intellectual property and an amplified role of the UN Development Group and resident coordinator system in addressing these issues if the governance framework is to improve;
- Non-UN international institutions, regional institutions and NGOs will also have an important role to play. Civil society, in particular, will have an important role to play in ensuring that there is sufficient reform not only within the UN but in other institutions including the WTO, the World Bank, OECD, South Centre and others;
- For all these reforms to happen, a key factor will be better coordination and coherence within and among developing

<sup>1</sup> Juma and Yee-Cheong, 2005, p176

countries, which are currently the only ones investing in protection of the public interest in the area of innovation, development, and intellectual property. Although these efforts are of immediate interest for these countries, they also constitute an important global service.

The paper is divided into four main parts. Part 1 provides a background to the issues. Part 2 highlights some of the major challenges that the world community faces in governing the

knowledge society in the 21st century. In Part 3, based on current processes and opportunities, such as the UN reform, the review of the MDGs, and the WIPO development agenda process, I examine how we could be thinking about innovation, development, and intellectual property in the UN. In the final section, Part 4, the paper concludes with some final remarks and thoughts about how the proposed rethinking could be taken forward.

# 1. Introduction

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International institutions can play a critical role in promoting the applications of science, technology, and innovation to the Millennium Development Goals (MDGs)<sup>2</sup>, other development goals and the aspirations of humanity as embodied in the United Nations (UN) Charter<sup>3</sup>. These organisations, especially the UN entities, have an extensive influence on the global development agenda. However, as the Millennium Project's Taskforce on Science, Technology, and Innovation correctly observes “Deploying these organisations' efforts to meeting the Goals will require them to focus on their functions and competencies rather than jurisdictional mandates”<sup>4</sup>. Only by combining competencies will multi-jurisdictional issues such as innovation, development, and intellectual property be properly addressed. Because new challenges will continue to emerge, new approaches and attitudes are required to enable us to create the institutional frameworks that can most efficiently tackle these challenges<sup>5</sup>.

Although there is widespread agreement that knowledge is central to development and general human progress, little comprehensive discussion has taken place within the UN about how this can be achieved<sup>6</sup>. The arrival of the knowledge society and the rise of institutions that represent the face of globalisation such as the World Trade Organisation (WTO) have, however, propelled the hitherto arcane issues of intellectual property and the implications for innovation and development into the global public policy debate<sup>7</sup>. A subject previously viewed as highly obscure and technical is today rightly engaging grassroots civil society organisations, for example in the campaign for access to medicines.

This phenomenon is partly as a result of the drastic changes and profound shifts that are taking place in the governance of knowledge<sup>8</sup>. International intellectual property rules and standards, which are expanding significantly, have important implications for the governance of knowledge. The standards and rules in this area now affect, more than ever before, everything from the availability and access to essential medicines to access to educational material, availability and access to seeds by poor farmers and the ability to use the internet to share culture.

Yet policy making at the national and international level has not kept up with these changes, neither in process nor content.<sup>9</sup> With growing public debate, international institutions are struggling to cope with the challenges of technology transformations and the competing ideas about how the knowledge society should be governed. Because new technologies may empower some actors and equally threaten others, their development reflects changing social interests. Various actors try to protect their interests by seeking to shape the policies of various institutions charged with governing relations between states in this area. Indeed, the effect could be far reaching, with the technologies that are developed themselves being a manifestation of the balance of power and interests. Organisations therefore have to deal with both the technological landscape and the shifting political interests that are expressed in discussions on these new technologies.

At the root of the current debate, though not always evident to everyone, is a fundamental question: what should be the

<sup>2</sup> Juma and Yee-Cheong, 2005, p161

<sup>3</sup> In addition to the maintenance of international peace, developing friendly relations among nations and serving as the centre for harmonising the actions of nations to attain common ends, the purposes of the UN under article 1 of the Charter also include achieving international cooperation in solving international problems of an economic, social, cultural or humanitarian character and

promoting and encouraging the respect for human rights and fundamental freedoms for all

<sup>4</sup> Juma and Yee-Cheong, 2005

<sup>5</sup> UNDP, 2001, p115

<sup>6</sup> Except, of course, for the useful work of the Millennium Taskforce (see Juma and Yee-Cheong, 2005) and a few other exceptions such as the 2001 Human Development Report, see UNDP, 2001

<sup>7</sup> The current debate on the role of intellectual property in economic development is, in large measure, taking place against the backdrop of the fundamental changes taking place in the wake of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

<sup>8</sup> Drahos, 2005, p15

<sup>9</sup> Boyle, 2004, p1

governance architecture and the rules for the generation, use and regulation of technology and knowledge in a globalised world<sup>10</sup>? For developing countries in particular, a key priority is to think creatively about models of governance for the production of knowledge which maximise their participation in the processes of innovation and the spillover benefits of knowledge while minimising the social cost of accumulating knowledge<sup>11</sup>.

The UN, the largest meeting place of world governments and the forum of choice for multilateralism, has a major role to play in this process<sup>12</sup>. Naturally, one would expect that the World Intellectual Property Organisation (WIPO), a specialised UN agency with the responsibility for promoting creative intellectual activity and facilitating transfer of technology would take a leading role in the UN. However, emerging evidence suggests that the idea that WIPO would take the lead in addressing the challenges of innovation, development, and intellectual property in the 21st century may be misplaced<sup>13</sup>.

As an institution that has concerned itself with intellectual property, WIPO was primarily founded and has been led, in terms of its policy direction, mostly by industrialised countries. The result has been a build up of significant bias against latecomers to the intellectual property policy field – developing countries. It is these countries which lag behind in development and therefore are the most in need of new technologies and the most affected by inefficiencies in the governance of the knowledge society. The proposal by a group of developing countries (Group of Friends of Development) for the establishment of a development agenda for WIPO<sup>14</sup> is therefore aimed at reducing and eventually eliminating the historical bias against them<sup>15</sup>. The proposal also seeks to position WIPO in a better position to contribute towards tackling the key challenges of the 21st century and thereby the achievement of the MDGs<sup>16</sup>.

The proposal by the Group of Friends of Development has, however, been met with the argument that WIPO already has a robust development agenda and that WIPO is not a development agency but an organisation specialising in intellectual property issues<sup>17</sup>. This argument is premised on the idea that WIPO's specialisation should not be diluted. As a corollary, except for the WTO, any attempts to have other UN agencies address intellectual property related issues have over the decades been met by the arguments that intellectual property issues are the province of WIPO.

The result is that key UN agencies whose mandates would rightly permit – indeed require – them to address matters of innovation and development, including intellectual property, are currently having very little say on the content and shape of the global innovation policy and governance architecture for the 21st century<sup>18</sup>. This would include, among others, organisations such as the Economic and Social Council (ECOSOC) and its relevant commissions, United Nations Conference on Trade and Development (UNCTAD), the UN Food and Agriculture Organisation (FAO), the World Health Organisation (WHO), the United Nations Development Programme (UNDP) and United Nations Educational, Scientific and Cultural Organisation (UNESCO).

But what does specialisation in intellectual property really mean<sup>19</sup>? If intellectual property rules such as patents and copyright are supposed to be policy instruments aimed at promoting creative intellectual activity, innovation, and dissemination of knowledge in different areas and sectors such as health, agriculture and software development, can an organisation specialise in intellectual property while others supposedly specialise in health, agriculture and information technology? For example, if the question is about innovation and incentives for innovation in the pharmaceutical and public health area who is the specialist, WIPO or WHO? So far the only widely accepted notion has been that intellectual property is trade-related, justifying the TRIPS Agreement in

<sup>10</sup> For a detailed discussion of the effects of the increasing privatisation and control of knowledge, see Maskus and Reichman, 2004

<sup>11</sup> Drahos, 2005, p16

<sup>12</sup> See article 1(4) of the UN Charter which provides that one of the purposes of the UN is to be a centre for harmonising the actions of nations in the attainment of goals related to maintaining peace and security, developing friendly relations among nations, solving international economic, social, cultural and humanitarian problems and promoting and encouraging respect for human rights and fundamental freedoms

<sup>13</sup> For a detailed analysis of how WIPO has failed to play a leadership role see eg, Commission on Intellectual Property Rights (hereinafter IPRs Commission), 2002; Musungu and Dutfield, 2003; Boyle, 2004; the Geneva Declaration on the Future of WIPO, 2004 (available at <http://www.cptech.org>); Drahos, 2002; and Maskus and Reichman, 2004

<sup>14</sup> The proposal, which was presented to the WIPO General Assembly by Argentina and Brazil and co-sponsored by 12 other countries (Bolivia, Cuba, the Dominican Republic, Ecuador, Egypt, Iran, Kenya, Peru, Sierra Leone, South Africa, Tanzania

and Venezuela) at its September/October 2004 session, is contained in WIPO document WO/GA/31/11. The General Assembly of WIPO thereafter created an intergovernmental (Inter-Sessional Intergovernmental Meetings – IIM) process to discuss the proposal in detail. The first meeting in that process was held in April, the second in June and the third in July 2005. Although there have been important discussions in these meetings, at the end of the third session, the IIM could not agree even on a recommendation to continue the IIM processes, primarily due to the resistance of the USA and Japan. For details of the debates in the three meetings see the reports of the meetings in WIPO documents IIM/1/6, IIM/2/10 and IIM/3/3

<sup>15</sup> Because of their position in the technological world, these countries have also become the champions of public interest groups in the developed world whose interests are not fully reflected in their governments positions in international fora. This explains why there is significant support for the Group of Friends of Development by northern NGOs and even industries at least with respect to specific proposals. For example, corporations such as Verizon has shown interest and have supported the idea of an access to knowledge treaty including

attending meetings such as the Geneva meeting on A2K in February 2005. Information about this meeting is available at <http://www.cptech.org/a2k/index.html#Feb>. Last accessed on 30 July 2005

<sup>16</sup> This, however, is not how everyone involved in the debate is seeing the proposal. See the statements of industry groups, such as the Business Software Alliance at the IIM meetings contained in the meeting reports (see note 14)

<sup>17</sup> See the proposal of the USA, WIPO document IIM/1/2

<sup>18</sup> This does not mean that these organisations are not doing important work in this area. As demonstrated in Part 3 of this paper, in fact the opposite is the case. The problem, however, is that this key work has somehow been dissociated from intellectual property discussions which are determining the governance structure and rules on innovation and development

<sup>19</sup> The issue of specialisation is both a function of institutions (basically their secretariats) reading their mandates too narrowly and being too guarded about mandates so as not to allow other players to have a say on the issues

the WTO but not the notion that intellectual property rules are also education-related, health-related, defence-related and environment-related and so forth<sup>20</sup>. Clearly, institutions such as WHO, FAO, the United Nations Industrial Development Organisation (UNIDO) and others have important and legitimate interests in framing and evaluating the impact of intellectual property rules in their areas of competence.

The questions that arise are of a fundamental and systemic nature. This paper therefore seeks to address some of these key questions that are particularly relevant in rethinking UN governance of knowledge. While there is an important focus on the role of WIPO, the paper examines wider issues beyond WIPO. Among others, the questions to be answered, and which this paper aims to help in answering, include:

- Will the innovations in science and technology that we are witnessing today be matched by innovations in global governance to turn technological advances into a tool for development and advancement of all humanity?
- What are the key challenges that face the world community in addressing the questions of innovation and development in the 21st century?
- Considering the history and the criticism of its performance, how has WIPO been able to maintain its approach to intellectual property in the UN?

- What is the role of the UN and its agencies, including WIPO, in providing the appropriate governance framework for dealing with 21st century challenges on innovation, development, and intellectual property?
- Although reforming WIPO is key, is such reform sufficient to address the issues of the day regarding innovation and access to knowledge?
- What mechanisms are needed to overcome the dominance of developed countries in international fora dealing with intellectual property and related issues, such that the needs of developing countries and the public interest are respected?

This paper builds on some of the ideas, conclusions and recommendations in the paper by myself and Graham Dutfield on TRIPS-plus at WIPO<sup>21</sup>. Developments since the publication of that paper in 2003, including the proposal for the establishment of a development agenda for WIPO, though confirming many of the conclusions of that paper, also attest to the need for a deeper and broader analysis. This paper begins that process.

I do not seek to propose a complete menu of the changes that are needed and how each UN agency should address these issues. Instead, the aim is more modest, being to lay a firm basis upon which a more informed and comprehensive debate about options could take place.

## 2. The knowledge society: the challenges of innovation, development and intellectual property in the 21st century

Despite the importance of the issues raised by the debates on knowledge and governance, few multilateral organisations are addressing the issue of how institutions of knowledge could be better designed to meet the goals of achieving basic freedoms and economic development<sup>22</sup>. At the same time, however, the breadth and coverage of rights that are today termed “intellectual property rights” is vast and there are daily attempts to extend “intellectual property’s” reach. The traditional areas of patents, copyright, trademarks and industrial designs have now been joined by a myriad other types of “intellectual property”, for example, trade secrets,

utility models, broadcasting rights and rights on compilations of data.

This tremendous expansion has been strongly promoted by industrialised countries. It is premised on the idea that their future economic success is primarily dependent upon their superior new knowledge<sup>23</sup>. With recent scientific and technical advances, particularly in biotechnology and information and communications technology (ICT), knowledge is now the principal source of competitive advantage for both companies and countries<sup>24</sup>.

<sup>20</sup>Abbott, 2005, p85. Abbott observes that so far industries and their lobbies in developed countries have been largely successful in getting their governments to keep the centre of intellectual

property related power at WIPO and the WTO

<sup>21</sup> See Musungu and Dutfield, 2003

<sup>22</sup> Drahos, 2002

<sup>23</sup> Cornish and Llewelyn, 2003, p6

<sup>24</sup> IPRs Commission, 2002, p11

It is for this reason that there has been a great deal of political and legal activity in the last two decades designed to assert and strengthen the various forms of intellectual property. The United States of America (USA), currently a technological leader in many areas, for example, sees the current intellectual property standard-setting, multilaterally and bilaterally, as a key part of its strategy to “create new opportunities for the United States and preserve the unparalleled strength of the United States in economic, political and military affairs”<sup>25</sup>. Other industrialised countries tend to see the world through the same lens. Developing countries, the most in need of new technologies, but the least able to generate or pay for such technologies, on the other hand, seek an international environment that allows them to upgrade their science and technology capabilities by facilitating access to, and offering possibilities to imitate and adapt the newest and best technology.

No country in the world favours perpetual property rights for inventors or creators though there are continuous efforts to create such rights<sup>26</sup> and some types of “intellectual property” such as trademarks and trade secrets can exist in perpetuity. It is recognised that perpetual rights for inventions, for example, would have remarkable implications politically and economically<sup>27</sup>. Imagine the economic impact and the political ramifications if patents on pharmaceuticals were granted in perpetuity. Historically, the approach to intellectual property has been to confer limited forms of protection. The root issue is to ensure a balance between the socio-economic and political purposes sought to be achieved through intellectual property rules and competition and availability of products and services. When these tensions between the public and private interests in the production of knowledge goods are translated from their territorial base to the world market, however, they become far more acute<sup>28</sup>. The balance that needs to be reached, then, is not just between the interests of particular actors in a country but between actors in different countries and more generally between developed and developing countries as net exporters and importers, respectively, of knowledge goods and services.

The marked tendency today is to reach answers to the questions of balance in intellectual property through political decisions primarily through legislation<sup>29</sup>. This is partly because it is assumed that the various interest groups are supposed to make out their case sufficiently to a responsible body. However, at the national level questions arise whether national legislatures, for example, the US Congress, are such responsible bodies when lobbying and financial contributions seemingly influence the outcomes. At the international level, similar questions are now being raised as to whether WIPO, for example, is a responsible body at which different govern-

ments and interest groups can make their case and seek to find balanced solutions. Without a responsible body taking on the regulatory task to identify measures that would promote global welfare without creating barriers to trade and access to knowledge, acute tensions now exist in the knowledge goods sector of the world economy and within countries including within developing countries. There are a number of problems and challenges that stem from this situation<sup>30</sup>.

This section highlights some of the key challenges that face the world community in appropriately governing the knowledge society and how to deal with intellectual property. The range of the challenges we face suggest that the reform of the system(s) relating to the regulation of innovation and intellectual property are just too important to be limited to the reform of WIPO and WTO or to leave these two institutions to address the challenges.

## *2.1 The principle of minimum intellectual property standards backed by trade retaliation*

It is now widely accepted that the adoption and entry into force of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) significantly changed the international intellectual property regime in both institutional and conceptual terms. By linking the principle of minimum intellectual property standards to an effective dispute settlement system, the TRIPS Agreement became the *de facto* strategic basis for subsequent multilateral and bilateral intellectual property standard setting. The TRIPS Agreement also ushered in the era where higher standards for intellectual property protection could be directly obtained in exchange for deals in core trade areas such as agriculture<sup>31</sup>.

The open trade and investment regimes promoted by the WTO and others are supposed to work best to encourage development and structural transformation where markets for information and technology transfer are competitive in ways that allow innovation, learning, and diffusion to flourish<sup>32</sup>. However, the ever-increasing levels required for the protection of information, technology, and creative activity through intellectual property rights, based on the minimum rights approach, is creating a technological roadblock for developing countries in their efforts to integrate into the world economy. Increased levels of protection are stifling innovation and drastically undercutting the opportunities for learning and diffusion that industrialised countries had previously enjoyed. As Maskus and Reichman point out:

“The natural competitive disadvantages of follower coun-

<sup>25</sup> See section 2101(b) (2) of the US Trade Act 2002

<sup>26</sup> For example, the copyright term has progressively expanded from 14 years to over 90 years today and efforts to extend the period continues

<sup>27</sup> Cornish and Llewelyn, 2003, p12

<sup>28</sup> Maskus and Reichman, 2004, p293

<sup>29</sup> Cornish and Llewelyn, 2003, p12

<sup>30</sup> For detailed discussion see Braithwaite and Drahos, 2000; UNDP, 2001; the IPR Commission, 2002; Federal Trade Commission (FTC), 2003; OECD, 2004; World Bank, 2005; Juma and Yee-

Cheong, 2005 and UN Millennium Project, 2005

<sup>31</sup> Under TRIPS trade measures can now be used as an internationally accepted avenue to enforce intellectual property standards abroad

<sup>32</sup> Maskus and Reichman, 2004, p281

tries may become reinforced by a proliferation of legal monopolies and related entry barriers that result from global minimum intellectual property (IP) standards. Such external constraints on competition could consign the poorest countries to a quasi-permanent status at the bottom of the technology and growth ladder<sup>33</sup>.

One would imagine that with the emerging evidence from key bodies and institutions of these problems measures would be taken to seriously address this situation<sup>34</sup>. The fixation on the TRIPS minimum standards because of the possibility of trade retaliation, however, has become a major problem blinding policy makers to these obvious concerns and making it almost impossible to have a decent debate on the fundamentals. The focus of the policy debate, as a result, has largely been on compliance issues and much less on public policy issues.

## *2.2 The loss of balance in intellectual property policy and rules*

The exponential expansion of intellectual property has led to a substantial increase in the imbalance between the public domain and the realm of property rights<sup>35</sup>. However, although the potential cost of such loss of balance is huge, the international discussion continues to be dominated by dubious and inflated costs of piracy<sup>36</sup>. The unbalanced intellectual property regimes in the developed world, which are being exported to developing countries, may be triggering counterproductive results and the concomitant risks that efforts by powerful industries to lock in temporary competitive advantage may raise the costs of innovation for developing countries<sup>37</sup>. For example, because a patent confers on the right holder the right to prevent all others from using an invention, be they imitators or inventors who have arrived at the same idea independently, it can be a potent tool for the right holders and dangerous for competitors<sup>38</sup>. Where real breakthroughs are conferred with strong patents, the potential is sometimes so considerable as to render competition obsolete<sup>39</sup>.

The fundamental balance between the public domain and the extent of property rights seems to have been lost.<sup>40</sup> The assumption seems to be that the promotion of intellectual property automatically translates into promotion of innovation and is therefore of benefit to society. Although the loss of balance has occurred both nationally and in the international context there is a more acute problem at the international level. At the national level there remains some room for political pressure

to be brought to bear upon legislators. At the international level this is almost completely absent.

The loss of balance is not only reflected in rule-making but has also manifested itself in technical assistance and capacity building programmes. In the recent past, for example, WIPO's technical and legal assistance activities have been shown to suffer from this problem. There are two main concerns. The first is that the WIPO Secretariat, especially its legal technical assistance, and the intellectual property offices of developed countries which provide technical assistance, have tended to over-emphasise the benefits of intellectual property while giving very little attention to its costs<sup>41</sup>. This is not surprising given the interpretation of WIPO's mandate is based only on its founding Convention. Other critics have accused the WIPO Secretariat, in particular, of being partisan and not giving developing countries the best advice<sup>42</sup>. For example, despite the adoption of the Doha Declaration on the TRIPS Agreement and Public Health in November 2001, there continues to be a publication on WIPO's website which essentially labels all the concerns that developing countries have raised with regard to TRIPS and public health as 'myths' four years later<sup>43</sup>.

The second concern is that because of the nature of activities under the technical assistance programmes – legal technical assistance, automation of offices and provision of software, training – the WIPO Secretariat may exercise undue influence on developing countries, which may affect the stances of these countries in WIPO negotiations<sup>44</sup>. It is for this reason that in TRIPS Issues Paper 3 we argued that the WIPO Secretariat may be too compromised and institutionally limited to improve. We therefore proposed that consideration should be given to separating the norm-setting functions of WIPO from the technical assistance functions<sup>45</sup>.

## *2.3 The incumbency problem*

Intricately linked to the loss of balance is the incumbency problem in this area. The current agenda on intellectual property is being pushed and articulated by industrialised country governments representing the commercial interests of a limited set of industries<sup>46</sup>. These industries, what Maskus and Reichman call a "knowledge cartel", depend on the sales of existing innovations and therefore push their governments to regulate the global market in a manner that would enable them to lock in their temporary competitive advantages (incumbency) without necessarily benefiting the global public interest in innovation and competition<sup>47</sup>. They are using the intellectual property system as an anti-competition weapon against competitors from both within and outside their home states.

<sup>33</sup> Maskus and Reichman, 2004, p282

<sup>34</sup> For detailed discussion of some of these problems and evidence pertaining to the loss of balance see Braithwaite and Drahos, 2000; UNDP, 2001; the IPR Commission, 2002; Sell, 2003 and the UN Millennium Project, 2005

<sup>35</sup> Boyle, 2004, p2

<sup>36</sup> Losses attributed to piracy are routinely based only on industry figures and are determined on estimates of piracy not empirical data

<sup>37</sup> Maskus and Reichman, 2004, p283

<sup>38</sup> Cornish and Llewelyn, 2003, p7

<sup>39</sup> Cornish and Llewelyn, 2003, p8

<sup>40</sup> Boyle, 2004

<sup>41</sup> IPR Commission, 2002

<sup>42</sup> Medicines Sans Frontieres, 2003

<sup>43</sup> See publication entitled, "Striking a Balance: Patents and Access to Drugs and Health Care" at [http://www.wipo.int/about-ip/en/studies/publications/health\\_care.htm](http://www.wipo.int/about-ip/en/studies/publications/health_care.htm). Last accessed on 29 July 2005

<sup>44</sup> May, 2004a and 2004b and Musungu and Dutfield, 2003

<sup>45</sup> Musungu and Dutfield, 2003, pp23-24. Both proposals have been taken up in the discussions on the WIPO development agenda. The Group

of Friends of Development have proposed that (a) exploratory work be undertaken to consider the possibilities of separating the Secretariat's norm-setting functions and technical assistance functions, and (b) that a code of ethics be established for the Secretariat's technical assistance staff and consultants. For a discussion of the proposals see section 3.2 below

<sup>46</sup> Maskus and Reichman, 2004, p286

<sup>47</sup> Maskus and Reichman, 2004, p.295. See also Kingston, William, "An Agenda for Radical Intellectual Property Reform", in Maskus and Reichman (eds), 2005, pp653-661

Though this may appear reasonable within some developed countries, the push for the current intellectual property agenda seems more a reflection of policy capture than a reasoned attempt to even balance domestic needs<sup>48</sup>. As Jaffe and Lerner demonstrate, for example, the US patent system is so broken that it is impeding innovation rather than facilitating it<sup>49</sup>. In Europe, the previous “social dialogue” approach to policy making has evolved to US-style “special interests” approach<sup>50</sup>. Substantial influence is now exerted by thousands of lobby groups in Brussels on EU economic policy including in the area of intellectual property<sup>51</sup>.

The breakdown in the US and other patent systems is both a problem related to policy being driven by incumbent industries and the general democratic deficit in international decision making processes on patent law issues. In this regard, it is also important to remember that “governments gain leverage in the global economy on the coattails of their most powerful corporations, so they have a vested interest in their success. As a result industry has a tremendous influence in framing regulations...”<sup>52</sup>. In modern times an important element of the influence relates to the rising costs of financing election campaigns particularly with the advent of television campaigns, which have significantly escalated the costs<sup>53</sup>. The high costs have made politicians highly vulnerable to the businesses that finance the campaigns.

## 2.4 Lack of economic analysis

The knowledge goods sector, which is the most dynamic in terms of potential growth, is also partially resistant to any consensus-based economic analytical framework<sup>54</sup>. In a recent study Fink and Maskus conclude that “Although the existing economic literature on IPRs provides some useful guidance to policymakers in developing countries, there is still a lot we do not know”<sup>55</sup>. Proof of a correlation between strong intellectual property rights and foreign direct investment, for example, remains elusive<sup>56</sup>.

Though the regulatory area in which intellectual property applies is primarily economic, the intellectual property regime has been able to escape from any institutional economic analysis until the advent of the TRIPS-related debates. Only in the post-TRIPS era have core economic institutions such as the World Bank and the Organisation for Economic Cooperation and Development (OECD) begun to examine the economic issues around intellectual property more seriously. Even then institutions such as WIPO have yet to enter into this age.

Evidence-based policy and decision making has been thrown out the window. In Europe, for example, a remarkable shift

has occurred in economic policy governance<sup>57</sup>. The notion of dialogue where economic policy decisions were arrived at based on discussions and analysis has been transformed into a lobby-influenced approach to economic policy. This approach has led to a high level of inflexibility even in the face of new kinds of information products and new ways of generating them<sup>58</sup>.

## 2.5 Fighting rather than embracing new technologies such as the internet

The communication tools possessed by millions of citizens with the capacity for reproduction and distribution enabled by the internet means that issues that were previously viewed as issues between giant industries are now issues that affect individuals in their everyday life<sup>59</sup>. The potential for these tools and their ability to facilitate growth and development are just beginning to be understood. In the intellectual property debate, however, the astonishing ability of these technologies has largely been featured as increasing the threat of “piracy” of intellectual property.

As Boyle points out:

“Policy makers have had a 20/20 vision about the dangers of almost costless copying, but have been blind to its benefits – both to traditional content companies and to the larger society. In fact it is remarkable to consider that the areas where the internet has succeeded most readily for example as a giant distributed database of facts on any subject under the sun – are traditionally those in which there are little or no intellectual property rights. The software on which the internet runs is largely open source, another internet-enabled method of innovation to which policy makers have been slow to adapt. The internet offers us remarkable opportunities to achieve the real goals that intellectual property policy ought to serve: encouraging innovation and facilitating the dissemination of cultural and educational materials. Yet policy making has focused almost entirely on the internet’s potential for illicit copying.”<sup>60</sup>

Indeed, a long running battle continues between media and technology companies. While, for example, media companies have legitimate interests in protecting their copyright, technology and electronics firms’ such as Grostker and StreamCast, which were taken to the US Supreme Court recently, correctly argue that holding back new technologies, simply because they interfere with media firms established business models, will stifle innovation and lead to unjustified

<sup>48</sup> Maskus and Reichman, 2004 and Boyle, 2004, p3

<sup>49</sup> Jaffe and Lerner, 2004. For additional discussions in the context of the US Constitution see Kingston, 2005

<sup>50</sup> Nowotny, 2004

<sup>51</sup> This has led to the formation of a new Alliance for Lobbying Transparency and Ethics Regula-

tion (ALTER-EU), a grouping of NGOs and others aiming to support the ‘European Transparency Initiative’ (ETI), launched in March 2005 by European Commissioner Siim Kallas, see <http://www.corporateeurope.org/alter-eu.html>

<sup>52</sup> UNDP, 2001, p116

<sup>53</sup> Kingston, 2005

<sup>54</sup> Maskus and Reichman, 2004, p291

<sup>55</sup> Fink and Maskus, p13

<sup>56</sup> Abbott, 2005, p82

<sup>57</sup> Nowotny, 2004

<sup>58</sup> Kingston, 2005, p657

<sup>59</sup> Boyle, 2004, p5

<sup>60</sup> Boyle, 2004, p6

restraint on trade<sup>61</sup>. The challenge, argues the Economist, is to get content providers (media firms) to use the new technologies to create value for their customers, not to seek to stop innovation that is threatening their current business models. The Geneva Declaration on the Future of WIPO sums up the current situation thus:

“Humanity stands at a crossroads – a fork in our moral code and a test of our ability to adapt and grow. Will we evaluate, learn and profit from the best of these new ideas and opportunities, or will we respond to the most unimaginative pleas to suppress all of this in favour of intellectually weak, ideologically rigid, and sometimes brutally unfair and inefficient policies?”<sup>62</sup>

The debates surrounding open and free software also illustrate this problem. For example, when in July 2003 a group of 69 eminent scientists and economists including Nobel laureates asked the Director General of WIPO to convene a meeting to examine open collaborative models the meeting was opposed strongly by the USA. Although the issues raised in the letter were varied, the reaction was primarily due to fears about discussions on open and free software. The US Director of International Relations for the US Patent and Trademark Office (USPTO), for example, argued that WIPO could not hold the meeting because such a meeting ‘would run against the mission of WIPO to promote intellectual property rights’<sup>63</sup>.

## *2.6 Undemocratic and ideological international standard-setting processes*

Another challenge is how negotiations on rules and standards are undertaken internationally. The players in international policy making are currently seen as only the USA, Europe, Japan and a few other OECD countries. The legitimacy of the current system is therefore a big problem. An example of this approach is what is happening in the negotiations on the Substantive Patent Law Treaty (SPLT) at WIPO. These negotiations were started off and have been carried out principally as a process aimed at resolving differences between Europe and the USA on such issues as first to file/first to invent in patent applications. The assumption has been that if these differences are resolved, then we have harmonisation. Developing countries have just not been seen as players neither by industrialised countries nor by the WIPO Secretariat. In fact, in recent years when developing countries have come in with their own demands these have been received with some annoyance, with their demands being seen as misguided and an irritation<sup>64</sup>.

<sup>61</sup> The Economist, July 2nd 2005, p13. The case was between, Metro-Goldwyn-Mayer Studios Inc, et al v Grokster, Ltd, et al, No 04-480, Supreme Court of the United States. Although the Supreme Court found against Grokster and StreamCast based on “inducement theory”, the Court upheld the so-called Sony Rule which basically reflects the argument that the two companies make

<sup>62</sup> The Geneva Declaration on the Future of WIPO, 2004 (available at <http://www.cptech.org>)

<sup>63</sup> Various news stories and the discus-

In this post-TRIPS world one has to understand that other countries are now also players, and must have their say and their needs must be addressed. The major problem therefore is the premises upon which discussions are taking place. Accepting that small countries have a stake and that they should influence how the intellectual property system develops is a big challenge for the intellectual property bureaucracies in Europe, the US, Japan and other industrialised countries as well as industry lobbies. The attitudes in the developed countries, particularly the patent offices of these countries, largely remain that developing countries know very little about intellectual property, if anything, and the only thing they should be talking about is how much technical assistance they should be getting so they can better understand the benefits of the intellectual property system<sup>65</sup>. If small countries are not accepted as stakeholders, the system has no legitimacy.

The democratic deficit in standard-setting processes in intellectual property is exacerbated by the limitations of developing countries’ intellectual property offices, which have dominated policy-making in this area especially in WIPO processes<sup>66</sup>. Due to limitations in resources and analytical capacity coupled with heavy reliance on technical assistance from developed countries’ intellectual property offices and WIPO, developing countries’ offices have tended to be either passive or to only focus on technical aspects and not policy implications when participating in international standard-setting. Strong professional affinities between intellectual property officials from developed and developing countries, as members of a functional trans-governmental network, has contributed to the inability of some developing country officials to clearly delineate their national interests<sup>67</sup>.

## *2.7 Inconsistency and lack of coordination within and among developing countries*

In a situation where industrialised countries’ international intellectual property agenda has been captured by incumbent industries, developing countries have by default become the international defenders of the public interest in this policy area<sup>68</sup>. The extent and effectiveness of developing countries’ participation in intellectual property and other debates on innovation has, however, been varied and successes have been few and far between.

In the 1970s and 80s, developing countries, working together, started demanding an intellectual property regime that catered to their stages of development and pushed for treaty provisions that would give them more access to technology

sions around the letter are available at <http://www.cptech.org/ip/wipo/openwipo.html>. Last accessed on 29 July 2005

<sup>64</sup> For a discussion of this phenomenon, see Musungu and Dutfield, 2003, pp13-14 where they conclude that current harmonisation processes are primarily driven by industry groups and the WIPO Secretariat

<sup>65</sup> For a discussion of this attitude see the discussion on the patent agenda and the role of the International Bureau in the patent agenda proc-

ess in Musungu and Dutfield, 2003, pp11-14

<sup>66</sup> Abdel Latif, 2005, p23

<sup>67</sup> Abdel Latif, 2005, p23

<sup>68</sup> While the demands of developing countries are primarily related to their interests and needs it is no secret that the things they are fighting for are also of significant interest to certain segments of groups and interests in the North who feel basically abandoned by their governments

which was increasingly being locked up by intellectual property rights<sup>69</sup>. In this process, the Paris Convention became a subject of Diplomatic Conferences for its revision in 1980, 1981, 1982 and 1984 with developing countries particularly pushing for more liberal provisions on compulsory licensing<sup>70</sup>. In copyright, this pressure had led to the adoption of the 1967 Stockholm Protocol to the Berne Convention aimed at giving developing countries greater access to copyrighted educational materials.

A key factor contributing to the dismal performance of developing countries in international negotiations has been lack of coordination and policy coherence. Drahos has recently aptly summed up the problems as follows:

“Key factors that explain the negotiating failures of developing countries are a lack of trust amongst developing country groups, a myopic focus on single issues rather than the game in aggregate, insufficient political support from the capitols for negotiators, inadequate technical analyses of issues, a failure of co-ordination within and across bilateral and multilateral fora and, finally a lack of boldness of vision”<sup>71</sup>.

In a recent seminal paper, Abdel Latif concludes that as a result of lack of coordination, developing countries will remain victims in a vicious circle where new intellectual property standards will be negotiated which do not address their concerns and where their achievements on a particular issue in one forum may be lost or undermined in another forum<sup>72</sup>. He proposes therefore that developing countries need to identify coordination as a priority in itself and seek to establish or reinforce the appropriate institutional arrangements that enable this.

## 2.8 Glossing over historical evidence and lessons

The history of the development of the intellectual property regimes provides important lessons on how different coun-

tries have approached the issue at different stages of development<sup>73</sup>. The countries that are now preaching on the virtues of minimum levels of intellectual property protection did not follow this path to industrial development<sup>74</sup>. Even within industries in these countries patterns of use of intellectual property typically varied, and still do to an extent, as industry develops and matures<sup>75</sup>. In the current international debate, however, the lessons and historical evidence are usually glossed over. Even the nuanced approach to intellectual property by recent high growth countries such as China, Taiwan and South Korea is routinely ignored or minimised.

The explosive economic growth in China in the face of harsh claims of poor intellectual property protection by the USA and others<sup>76</sup>, for example, suggests that strong intellectual property protection is not as a central a driver in innovation and technological development as is claimed. Based on a review of historical evidence Dutfield and Suthersanen in a recent paper conclude that:

“There is ample historical evidence to indicate that freedom to imitate was an essential step towards learning how to innovate. In addition, numerous examples show that relatively unfettered access to goods, technologies and information from more advanced countries stimulated development in the less advanced ones. Support for both findings comes, as we saw, from the cases of Holland, Sweden, Japan, the United States and the Asian Tigers. It is difficult to see why they would not also be true for today’s developing countries.”<sup>77</sup>

This type of analysis is virtually absent in the debates at WIPO and WTO on the balance that needs to be had, for example, to achieve the objectives of the TRIPS Agreement under Article 7.

<sup>69</sup> Musungu and Dutfield, 2003, p20

<sup>70</sup> Braithwaite and Drahos, 2000, p 61. See also Sell, 1998

<sup>71</sup> Drahos, 2005, p15

<sup>72</sup> Abdel Latif, 2005, p38

<sup>73</sup> For a discussion see Chang, 2002 and Dutfield and Suthersanen, 2005

<sup>74</sup> Boyle, 2004, p3 and Kingston, 2005, p658

<sup>75</sup> The debate and process in Europe on software patents demonstrates this

<sup>76</sup> See Abbott, 2005, p81

<sup>77</sup> See Dutfield and Suthersanen, 2005, p15

### 3. Rethinking the governance of innovation, development, and intellectual property in the UN

The UN is a behemoth organisation made up of a myriad entities dealing with many interrelated issues. Apart from the principal organs – the General Assembly, the Security Council, ECOSOC, the International Court of Justice (ICJ), the Secretariat and the Trusteeship Council – many of the UN's functional activities are undertaken by programmes and funds such as UNDP, UN Environment Programme (UNEP) and UNCTAD, specialised agencies such as the International Labour Organisation (ILO), FAO, UNESCO, and WHO, research and training institutes such as the UN Research Institute for Social Development (UNRISD), the various commissions under ECOSOC and other entities such as the Office of the United Nations High Commissioner for Human Rights (OHCHR)<sup>78</sup>.

Innovation, development, and intellectual property related matters have been discussed and addressed in the UN since its founding and before WIPO became part of the system. Indeed, according to some commentators, the proposal to establish WIPO and to eventually make it a UN agency was advocated, partly, to head off any attempt by UN agencies particularly ECOSOC to continue to deal with the subject of intellectual property<sup>79</sup>. Even with the entry into the UN system by WIPO, other UN bodies and agencies continued to have wide mandates to deal with innovation, science and technology issues including intellectual property. In fact, when WIPO joined the UN in 1974, its mandate as a UN agency was made specifically subject to the competencies of the UN and its organs particularly UNCTAD, UNDP, UNIDO, and UNESCO. The Annex contains details of the mandates and competencies relevant to the issues of innovation, development and intellectual property among the various UN organs, agencies, programmes and research institutions.

The reality, however, is that despite the existence of key mandates and competencies within the UN on matters of innovation, science, technology, development, and intellectual property, the overall approach to these issues in the last two decades has been disparate. The fiction that organisations such as WIPO specialise in intellectual property has particularly taken root during this period. Other UN agencies that could better address innovation and development issues including issues related to intellectual property have at best been weakened and at worst completely disenfranchised. It is partly because of this situation that the world community

now faces a global crisis in the governance of knowledge, technology and culture.

For the UN, the central, though not necessarily the most powerful multilateral institution of our time, the key question today is how innovation, technology, and science (knowledge) can be harnessed to contribute to the attainment of the MDGs. The Sachs Report therefore addressed the questions of innovation, science and technology including intellectual property<sup>80</sup>. Approached mainly in the context of trade and, in particular, in the context of the TRIPS Agreement, the Report acknowledges that development-oriented intellectual property laws require a delicate balance of market forces and public action and that such a balance is likely to be different for different countries. The Report also correctly acknowledges that the TRIPS Agreement takes little account of the levels of development of developing countries as well as their interests and priorities and recognises the potential and real dangers posed by the intellectual property rules that are being established under free trade agreements (FTAs) for the development prospects of developing countries. The report therefore concludes that “the flexibility provided for the implementation of TRIPS is less than sufficient on paper, and even less so in practice”<sup>81</sup>.

The Report then makes a clear case for revisiting the TRIPS rules to examine their impact on developing countries and to identify any additional flexibility that may be required. In other words, the Report makes a case for rolling back the detrimental standards of the TRIPS Agreement based on an assessment of the impact of its rules on developing countries and that such an approach is one of the prerequisites for achieving the MDGs.

The Report of the Millennium Project Task Force on Science, Technology, and Innovation, on the basis of which some of the final recommendations in the Sachs Report were made, concludes that:

“International institutions urgently need to realign their activities to reflect the technological requirements for implementing the Goals. This effort will not only help deploy available financial and other resources to meet the Goals, it will also help identify gaps in available resources. These efforts need to be undertaken in the context of a better understanding of the sources of economic growth.

<sup>78</sup> For more information see the UN Organisational chart at <http://www.un.org/aboutun/chart.html>. Last accessed on 30 July 2005

<sup>79</sup> Ladas, 1975. The entry into the UN family was

also meant to provide the organisation with the legitimacy it needed to attract more developing countries into its fold and not be seen as a club of industrialised countries. For further discussion see also Musungu and Dutfield, 2003

<sup>80</sup> UN Millennium Project, 2005, Chapter 14

<sup>81</sup> UN Millennium Project, 2005, Chapter 14, p219

The five-year review of the implementation of the Goals offers a unique opportunity to start this reconceptualisation process.<sup>82</sup>

The following discussion is aimed at contributing to this reconceptualisation process. The discussion focuses on how the mandates and competencies of key UN institutions relevant to the innovation, development, and intellectual property can be brought to bear in addressing the challenges of the 21<sup>st</sup> century knowledge society. I start with a review of the WIPO Development Agenda process followed by a discussion of the contribution that the UN more broadly can make including assisting in the process of reforming WIPO. The basic framework for the analysis is to consider how rethinking the approach to innovation, development, and intellectual property in the UN would contribute to addressing the challenges that were highlighted in Part 2 above.

Innovation, development, and intellectual property-related policy making at the international level encompasses at least six components, namely:

1. negotiations of new standards or a renegotiation of old standards and rules. Current examples include the negotiations on the SPLT in WIPO and the negotiations on the relationship between the TRIPS Agreement and the Convention on Biological Diversity (CBD) at the WTO;
2. administration of intellectual property service systems such as the Patent Cooperation Treaty (PCT) system and the Madrid systems at WIPO;
3. dispute settlement mechanisms such as the WTO dispute settlement system and the WIPO domain names arbitration system;
4. research on innovation, development, and intellectual property as well as assessment of effects of rules such as the on-going work by the Commission on Intellectual Property Rights, Innovation and Public Health (CIPIH) at WHO and the work undertaken by UNCTAD, UNDP, UNRISD and UN University (UNU);
5. technical assistance and capacity building programmes provided by WIPO, WTO, WHO, UNCTAD and most other UN agencies as well as a variety of other providers; and,
6. policy advocacy such as the work done by UNDP through the Human Development Reports processes.

To reform and strengthen the governance of innovation, de-

velopment, and intellectual property, we need to consider the optimum governance structure in overall terms as well as in specific areas. The various components are interlinked, however, and some, like research and analysis and technical assistance, are quite intricately linked.

### 3.1 The WIPO development agenda

Although WIPO is not the most important UN institution on matters of innovation, development, and intellectual property, due to historical bias and the deliberate strategies such as those used to weaken UNCTAD and UNESCO, WIPO today occupies an important place within the UN family on these matters. Consequently, a proper reconceptualisation of how the UN should deal with innovation, development, and intellectual property issues needs first to address WIPO reform. This sub-section offers some reflections on the proposals for WIPO reform in the context of the WIPO development agenda process.

The debate on the establishment of a WIPO development agenda, as already noted, began formally in September 2004 during the discussions on the proposal by the Group of Friends of Development<sup>83</sup>. The debate itself had, however, begun in earnest in 2002 following the publication of the report of the UK Commission on Intellectual Property Rights<sup>84</sup> coinciding with other critiques such as on the patent agenda<sup>85</sup>. Thereafter, a momentum started to build through seminars, workshops, conferences and publications<sup>86</sup>.

Following their initial proposal for the development agenda, the Group of Friends of Development have elaborated their proposal further<sup>87</sup>. The USA<sup>88</sup>, Mexico<sup>89</sup>, the UK<sup>90</sup>, Bahrain<sup>91</sup> and the African Group<sup>92</sup>, have also presented their own proposals. The debate in WIPO on the establishment of a development agenda centres on the following twin questions:

- To what extent has WIPO played a positive role in supporting the efforts to attain the MDGs and in addressing the 21<sup>st</sup> century challenges for establishing an appropriate, fair and just governance system for the knowledge society?
- What reforms are needed to ensure that WIPO appropriately contributes to the MDGs and to the overall efforts in addressing the challenges of governing the knowledge society?

Based on available evidence and analysis, and in particular

<sup>82</sup> Juma and Yee-Cheong, 2005, p176

<sup>83</sup> The original proposal is contained in WIPO document WO/GA/31/11

<sup>84</sup> See IPR Commission, 2002. There was some debate on WIPO before the Commission's Report including at the WIPO Conference on the patent agenda in March of 2002 but it is fair to say that the Report was a key catalysing event

<sup>85</sup> Correa and Musungu, 2002

<sup>86</sup> For example, there were important discussions in the various Bellagio dialogues on intellec-

tual property and development (see <http://www.iprsonline.org/index.htm>, last accessed on 30 July 2005); the Transatlantic Consumer Dialogue (TACD) Conference on the WIPO Work Programme, Lisbon, Portugal, 17 October 2003; Policy Dialogue on Intellectual Property and Sustainable Development organised by ICTSD and UNAIDS, Sao Paulo, Brazil, 17 June 2004; and the Workshop on the Future of WIPO organised by the TACD, Geneva, 13 – 14 September 2004

<sup>87</sup> See WIPO document IIM/1/4

<sup>88</sup> See WIPO document IIM/1/2

<sup>89</sup> See WIPO document IIM/1/3

<sup>90</sup> See WIPO document IIM/1/5 and IIM/2/3

<sup>91</sup> See WIPO document IIM/2/2. This Proposal has been co-sponsored by mainly Arab countries serviced by the WIPO Arab Bureau, namely, Jordan, Kuwait, Lebanon, Libyan Arab Jamahiriya, Oman, Qatar, Saudi Arabia, Syrian Arab Republic, United Arab Emirates and Yemen. Several of them are not WTO Members and have no obligations under TRIPS

<sup>92</sup> See WIPO document IIM/3/2

the analysis in Issues Paper 3<sup>93</sup>, I consider that WIPO has not sufficiently organised its activities and programmes to fulfil its mandate as a UN agency and has failed to play a positive role in supporting the attainment of the MDGs. Beyond the MDGs, available evidence and analysis also points to a failure by WIPO to face up to the challenges of our time over the governance of the knowledge society<sup>94</sup>. Finally, among the five main components that constitute international policy-making on innovation, development, and intellectual property, WIPO's contribution on negotiations, research and technical assistance has come under severe criticism<sup>95</sup>. The question that remains is what reforms are needed to ensure that WIPO appropriately contributes to the MDGs and to the overall efforts in addressing the challenges of governing the knowledge society? It is on this question that the main proposals on the development agenda focus.

Through the discussions at the Inter-Sessional Intergovernmental Meeting (IIM), a total of 40 specific action-oriented proposals have so far been culled out of the papers submitted by Member States<sup>96</sup>. Some proposals, particularly those from Bahrain and Mexico, argue for maintaining the status quo in WIPO<sup>97</sup>, while others, such as the main proposal of the UK, relate to the forum where discussions should be held and is therefore of limited usefulness and besides the point in discussing reform in WIPO<sup>98</sup>. Consequently, the analysis here concentrates mainly on the proposals by the Group of Friends of Development, the USA and the African Group. To facilitate analysis the proposals have been grouped into eight key areas.

### **3.1.1 Proposal to amend the WIPO Convention to include explicit language on the development dimension<sup>99</sup>**

The proposal here stems from the view that although WIPO has a wide mandate to address the implications of intellectual property and other rules governing creativity and transfer of technology for development under the UN Agreement, it has failed to do so partly due to the formulation of its 1967 Convention. Thus, to avoid confusion and deliberate attempts to limit the mandate of the organisation<sup>100</sup>, amending the 1967 Convention is necessary.

What, then, is the relationship between the UN-WIPO Agreement and the WIPO Convention? My view, as argued in Issues Paper 3, is that the UN-WIPO Agreement is the main constitutive instrument for WIPO as it exists today and therefore provides the starting point in determining WIPO's mandate. In effect, while the WIPO Convention still has force and is recognised within the UN-WIPO Agreement to the extent that WIPO is supposed to carry out its UN responsibilities "in accordance with its basic instrument, treaties and agreements administered by it"<sup>101</sup>, WIPO's objective of promoting intellectual property throughout the world can only be pursued to the extent that the promotion of intellectual property would result in the promotion of creative intellectual activity and transfer of technology. Here, the Group of Friends of Development argue persuasively that:

"While intellectual property protection may in particular circumstances promote creativity and innovation, it is neither the only way nor necessarily the most efficient or appropriate means for doing so at all times and in all sectors of the economy... WIPO must, as a matter of course, examine and address all features of existing intellectual property rights, including the economic and social costs that IP protection may impose on developing and least developed countries, as well as on consumers of knowledge and technology in both the North and the South. WIPO, moreover, must be open to, and actively consider, alternative non-intellectual property-type systems for fostering creativity, innovation and the transfer of technology, while recognizing the benefits and costs of each system. Higher standards of protection should be undertaken only when it is clearly necessary and appropriate for the promotion of creativity and the transfer of technology, and where the benefits outweigh the costs of protection."<sup>102</sup>

In the discussion in the IIM questions have, however, been raised about whether an amendment of the Convention is really necessary and whether the problem is not so much about what is on paper but how it is interpreted and implemented<sup>103</sup>. The other relevant question of course is whether, even with an amendment, much would change since an amendment to the WIPO Convention will only come into effect when it has been ratified by three fourths of all WIPO Members<sup>104</sup>.

<sup>93</sup> See Musungu and Dutfield, 2003

<sup>94</sup> IPR commission, 2002; Boyle, 2004 and Maskus and Reichman, 2004

<sup>95</sup> WIPO's domain names arbitration system and its technical functions with respect to the PCT and Madrid system as well as other service functions such as classification systems have not been similarly criticised

<sup>96</sup> A complete listing of all 40 proposals is contained in the report of the third session of the IIM, WIPO document IIM/3/3

<sup>97</sup> The proposals by Bahrain appear, for example, to have been copied from the WIPO programme and budget for the next biennium. Indeed, a Bahrain official revealed to IP-Watch, a news service, that the WIPO Secretariat had provided help on "technical" issues when the proposal was

prepared. Bahrain has also requested for the postponement of discussions on its proposals twice, at the second and third sessions of the IIM raising questions about the seriousness of the proposals

<sup>98</sup> The UK proposal is of limited usefulness because the Permanent Committee on Cooperation for Development Related to Intellectual Property (PCIPD) to which they propose sending the discussions on a development agenda is a body concerned only with the administration of technical assistance and they propose that it reports to the WIPO Conference, which has de facto been abolished. The proposal is beside the point because the WIPO General Assembly had in any case decided that the best way to address the proposals in a comprehensive manner would be through the IIM process. The Assembly was clearly aware of the existence of the PCIPD and in fact

considered this option but chose to establish a different process for good reason. It is a shame, though not unexpected, that it is this proposal that was used by the US and Japan to block a recommendation to the General Assembly on the renewal of the mandate of the IIM for another year

<sup>99</sup> Contained in WIPO document WO/GA/31/11

<sup>100</sup> The debacle around the open collaborative models meeting cited in section 2.5 above is a case in point

<sup>101</sup> See Article 1 of the Agreement.

<sup>102</sup> See para 16 of document IIM/1/4

<sup>103</sup> See the discussions on this point in the third session of the IIM, WIPO document IIM/3/3

<sup>104</sup> See Article 17 of the WIPO Convention

Finally, even with the best interpretation and implementation of the UN-WIPO Agreement, it is not clear whether the UN document is limited to industrial property matters or to all the other issues with which WIPO deals<sup>105</sup>. These are all valid points which need to be seriously considered.

While what is on paper may not necessarily change practice, the situation of WIPO is unique. The existence of two constitutive instruments (the UN-WIPO Agreement and the WIPO Convention) without clarity on their relationship has resulted in serious consequences. For almost 30 years, the organisation has operated based on a misreading of its core mandate by both the Secretariat and a majority of the Member states. This has significantly contributed to WIPO's failure to play its rightful role in addressing the growing challenges in the governance of the knowledge society. Consequently, despite the general agreement by WIPO Members that the UN-WIPO Agreement provides WIPO with sufficient mandate to address development issues and other 21<sup>st</sup> century challenges, the issue of amending the WIPO Convention still remains valid if the current situation is to be avoided in future.

A more fundamental reason for amending the WIPO Convention, and probably even the UN-WIPO Agreement, is to address the question of the application of the UN Agreement to all WIPO activities and subject matter termed "intellectual property".

Finally, while the coming into force of an amendment and, even the negotiations, are likely to take a long time, pursuing this issue might still be worthwhile. It could be considered in a step-wise manner<sup>106</sup>. The long time that an amendment process takes may actually be an important advantage to the proponents of a development agenda; it will ensure that WIPO's mandate and thereby its activities are under continuous scrutiny over that period. Continuous discussions and negotiations on the issue would have a spillover effect and may help stymie some of the egregious proposals for the expansion of intellectual property rights under WIPO's watch. At the very least, while the issue may be put on the back burner at the moment, there is sufficient justification to retain it on the agenda.

Overall, this proposal, if followed through, could help in addressing the challenges relating to: the loss of balance in intellectual property rules; undemocratic and ideological international standard-setting; and the problems relating to technical assistance.

<sup>105</sup> The phrase in Article 1 of the Agreement says "for promoting creative intellectual activity and for facilitating the transfer of technology related to industrial property" (emphasis added)

<sup>106</sup> In a draft decision presented at the third session of the IIM, the Group of Friends of Development suggested to start with a declaration affirming the UN mandate of WIPO while consideration continues on an amendment. A soft law solution (declaration) to start with may be the logical first step in the process of amendment

<sup>107</sup> Contained in WIPO document IIM/1/4. See also WIPO document IIM/3/2 for the African Group proposal on technology transfer

<sup>108</sup> For a summary of the existing structure see Musungu and Dutfield, 2003

<sup>109</sup> See document IIM/1/4 paras 83 to 98 for detailed discussions of some of the issues related to technology transfer that are proposed to be addressed in WIPO and presumably by SCTT together with other relevant bodies. Among oth-

### 3.1.2 Proposal to establish a WIPO Standing Committee on Intellectual Property and Technology Transfer (SCTT)<sup>107</sup>

The issue here is simple. Because WIPO has a constitutional role to facilitate the transfer of technology, it can only fulfil this mandate if it has a dedicated work programme on transfer of technology. Since 1998, dedicated work programmes in WIPO have mostly been undertaken through standing committees or working groups<sup>108</sup>. According to the Group of Friends of Development, the SCTT would among other things address issues such as supportive intellectual property-related policies by industrialised countries, and multilateral supportive measures as well as the other issues suggested in the proposals by the Group of Friends of Development and the African Group<sup>109</sup>.

The establishment of such a Committee has been opposed on two main grounds. First, it has been argued that creating new bodies in WIPO is not desirable as there are cost implications. Secondly, it has been argued that, apparently, the WTO Working Group on Trade and Transfer of Technology (WGTTT) is the right forum to address transfer of technology issues and that WIPO should not duplicate this work<sup>110</sup>.

Clearly both reasons are at best spurious. To argue that simply because it will cost something a body, to undertake a key constitutional mandate of WIPO, should not be established raises the question of what WIPO's money should be used for if not to fulfil its constitutional duties. The second argument fits in with a strategy to relegate all the issues relating to a development agenda to bodies, which are ineffectual if not dead. As it is well known, the WTO Working Group on Trade and Transfer of Technology (WGTTT) has achieved very little since its creation, if anything, and its prospects remain dim if not nil.

Subject to the role that UNCTAD and other UN agencies and bodies such as UNIDO should play on issues of transfer of technology, it is reasonable to argue that WIPO should at least address the industrial property-related measures for transfer of technology. For developing countries, the establishment of the SCTT should be pursued both as a matter of principle – ensuring that WIPO performs its constitutional functions – and to ensure that proposed treaties address transfer of technology. In a certain sense, this could be the easiest proposal to implement as it does not require major decisions or studies. It seems, however, that developed countries will do anything to keep technology transfer out of WIPO, supposedly fearing that once this issue is introduced, WIPO could become the

ers, the African Group has also supported the creation of a body on transfer of technology and within that body work to be undertaken in conjunction with UNCTAD on developing a list of essential technologies for development

<sup>110</sup> See , the UK statements at the first and second IIM

UNCTAD of the 1960s, 70s and 80s.

Implementation of this proposal will contribute to addressing the challenges relating to loss of balance in rules, and the inadequate attention to science, technology and innovation issues in WIPO.

### 3.1.3 Proposal to elaborate a treaty on access to knowledge and technology<sup>111</sup>

The proposal here is that to address the various barriers that intellectual property rules have placed in the way of access to knowledge, technology and information, WIPO should start negotiations on a treaty on access to knowledge and technology. Under the treaty at least minimum access rights and matters related to technology transfer could be addressed. Although this proposal has not been discussed much in the IIM, it is the one proposal that has attracted the most attention and support from civil society organisations, companies and academics. Indeed, a movement on access to knowledge has emerged and has been growing fast. There are already initial draft texts of possible provisions of such a treaty<sup>112</sup>.

For developing countries, a treaty on access to knowledge would address at least two concerns<sup>113</sup>:

- those relating to investments in human capital particularly education and health.
- those regarding models that maximise the participation of developing countries in the processes of innovation and the spillover benefits of knowledge while minimising the social cost of accumulating knowledge.

Various options may be considered for the treaty. Drahos, in particular, has proposed that a framework treaty setting down guiding principles may be what to aim for initially<sup>114</sup>. This approach is justified based on the experience over the years where framework treaties have proved quite effective in getting states to agree on basic principles which later evolve into specific enforceable obligations. Considering the importance of the issues raised and the growing movement behind such a treaty, this may be one of the centre-pieces of the WIPO development agenda. The basic ingredients of success exist. Other than the benefits that would derive from a treaty, the discussions and negotiations on such a treaty are likely to be the best vehicle to keep the issues on the agenda for a long time and to galvanise public opinion.

The treaty idea is therefore a significant strategic organising tool for most of the substantive issues raised in the development agenda. Following it through will contribute significantly to addressing the challenges over: the principle of minimum intellectual property standards; the loss of balance in intellectual property policy and rules; the incumbency prob-

lem; and, fighting rather than embracing new technologies.

A key strategic question, however, is whether, considering the far reaching implications of such a treaty and subject matter coverage, it should be developed as a WIPO only treaty. Given the mandates and competencies of UNESCO, WHO and the ECOSOC Commission on Science and Technology for Development (CSTD) as well as UNCTAD, would it not be better as a UN-wide discussion? A good start has been made at WIPO but probably it is time to spread out the issue. To do this, however, better coordination and coherence among developing countries will be needed.

### 3.1.4 Proposals to restructure and improve technical assistance

There are various proposals under this rubric including to:

- formulate and adopt principles and guidelines for the development and implementation of technical assistance;
- commence exploratory work on defining and separating the WIPO Secretariat's technical assistance and capacity building functions from norm-setting related functions;
- formulate and adopt a code of ethics for technical assistance staff and consultants;
- improve information sharing on technical assistance including the establishment of databases and a dedicated webpage;
- develop indicators and benchmarks for the evaluation of WIPO technical assistance<sup>115</sup>;
- strengthen the strategic use of the intellectual property system including its flexibilities, for development, including the creation of a WIPO Partnership Programme entailing, *inter alia*, the creation of: (a) WIPO Partnership Database; and (b) WIPO Partnership office<sup>116</sup>; and,
- impact assessments<sup>117</sup>.

The aim of these measures is to improve the quality of WIPO's technical assistance to better meet the needs of recipients and maximise use of the resources available. The measures will also help address the many documented concerns about WIPO's technical assistance.

Although there has been some resistance to these proposals based on the argument that WIPO's technical assistance has been satisfactory, they have received some support, including from developed countries. Apart from the debate in WIPO, the idea of principles and guidelines and better evaluation of technical assistance has already received significant interest from development and other donor agencies<sup>118</sup>. Moreover such principles and guidelines and codes are well-established in trade-related technical assistance and capacity building<sup>119</sup>.

<sup>111</sup> Contained in WIPO document WO/GA/31/11. See also document IIM/3/2 in which the African Group supports this idea although the term "mechanism" is used as opposed to a treaty

<sup>112</sup> For information on the process best known as "A2K" see <http://lists.essential.org/pipermail/a2k/>

<sup>113</sup> Drahos, 2005, p16

<sup>114</sup> Drahos, 2005, p16

<sup>115</sup> All contained in WIPO document IIM/1/4

<sup>116</sup> Contained in WIPO document IIM/1/2

<sup>117</sup> Contained in WIPO document IIM/3/2

<sup>118</sup> Workshop on "Reflecting on IPR Technical Assistance for Developing Countries and

Transition Economies", Burnham Beeches, UK, 15-17 Sep 2004, sponsored by the UK Department for International Development

<sup>119</sup> See the OECD Development Assistance Committee (DAC) 1991 Principles for Evaluation of Development Assistance

Overall, therefore, this appears to be another area where the prerequisites of success basically exist and all that is needed is some sustained pressure.

Yet, as with the access to knowledge treaty, should such principles and guidelines, codes and benchmarks be pursued just in WIPO or more widely across the UN or more broadly in the WTO, World Bank, OECD, South Centre, regional economic institutions as well as non-state providers? While WIPO will continue to provide some technical assistance, it is not clear strategically that political capital should be spent working on WIPO if the main goal is to divest WIPO proper of as much responsibility as possible on technical assistance and transfer such responsibility either to an independent entity – as proposed by the Group of Friends of Development – or to other UN agencies such as UNCTAD and UNDP as well as other non-UN entities. These latter might be better placed to integrate intellectual property technical assistance into the wider development assistance for developing countries.

That said, the implementation of these proposals, even if limited to WIPO, is likely to significantly contribute to addressing the challenges over: the principle of minimum standards; the loss of balance in intellectual property policy and rules; undemocratic and ideological international standard-setting; and lack of consistency and coordination within and among developing countries.

### **3.1.5 Proposal to establish an independent WIPO Evaluation and Research Office (WERO)<sup>120</sup>**

The proposal here is that WERO, which would report directly to the WIPO General Assembly, should be established to provide a transparent, independent and objective mechanism, *vis-à-vis* the General Assembly, the WIPO Secretariat and all interested stakeholders, through which WIPO's programmes and activities could be evaluated for their development impact in general, and their impact on innovation, creativity and access to and dissemination of knowledge and technology<sup>121</sup>. The concept of independent research and evaluation bodies is not new and has been applied within the World Bank<sup>122</sup>, the IMF<sup>123</sup> as well as other organisations such as the UNDP<sup>124</sup>.

In the discussions at the IIM, the proposal has been opposed on two main grounds<sup>125</sup>:

- that the establishment of WERO would not make WIPO a more member-driven organisation since there is no provision for member states participation in WERO.
- that the cost of establishing such a body would be high.

The risk of capture by interest groups certainly exists. The structure of an entity such as WERO should be considered carefully and take into account the experiences of other international organisations. If these experiences demonstrate a high danger of these types of risks, then some level of member state participation could be considered based on a formula similar to that that has been recently proposed in WIPO regarding the composition of an independent audit committee.

To do this, however, further discussion and information is required. Indeed, the Group of Friends of Development stated that “it is clear that the possible role and functions of such an independent evaluation unit would have to be carefully examined and discussed by Member states”<sup>126</sup>. The first step, then, could be to invite the heads of such institutions as the World Bank and UNDP as well as the heads of the evaluation units in those institutions to present their experiences to WIPO members, say in the first IIM or other appropriate body after the General Assembly meeting in September/October 2005.

On cost, everything has a cost, the key issue is whether the cost is justifiable. If WERO could significantly contribute to addressing the challenges related to: the loss of balance in intellectual property policy and rules; the incumbency problem; lack of economic analysis; fighting rather than embracing new technologies such as the internet; ideological international standard-setting; and inadequate attention to science, technology, and innovation in WIPO, then its costs would be justified.

### **3.1.6 Proposal to undertake independent, evidence-based “Development Impact Assessments” (DIAs) with respect to norm-setting activities<sup>127</sup>**

This proposal is interlinked to that for the creation of WERO and is one way to implement evidence-based standard-setting. Basically, it proposes that independent, evidence-based development impact assessments (DIA) should be undertaken to evaluate the possible implications of proposed norm-setting activities for key indicators such as the contribution to innovation, access to knowledge and education. Although termed DIAs, the assessments would address key indicators that are relevant to all countries and not just developing countries. Of course developing countries and least-developed countries (LDCs) will benefit most from such assessments since the consequences of poor standards and policies in this area have the largest impact on them and their vulnerable populations. Although governments and international institu-

<sup>120</sup> Contained in WIPO document IIM/1/4. See document IIM/3/2 in which the African Group supports most of the work to be undertaken by WERO though not explicitly supporting WERO

<sup>121</sup> For details see particularly paras 28-30 of document IIM/1/4

<sup>122</sup> Information about the World Bank independent evaluation is available at <http://www.worldbank.org/oed/gppp/>. Last accessed on 30 July 2005

<sup>123</sup> Information on the independent evaluation unit is available at <http://www.imf.org/external/np/ieo/>. Last accessed on 30 July 2005

<sup>124</sup> Information on UNDP's evaluation system is available at <http://www.undp.org/eo/>. Last accessed on 30 July 2005

<sup>125</sup> For detailed discussions and the various arguments for and against this proposal see the report of the third session

of the IIM in WIPO document IIM/3/3

<sup>126</sup> See para 30 of document IIM/1/4

<sup>127</sup> Contained in WIPO document IIM/1/4.

See also document IIM/3/2 in which the African Group supports this proposal

tions such as the World Bank and the WTO have routinely estimated the impacts of changes in tariffs prior to concluding agreements, until recently this has not been the case for intellectual property<sup>128</sup>. In some areas, such as pharmaceuticals, assessments are feasible as there exists significant amounts of hard data that could be assembled and methodologies developed for analysis.

The main argument against this proposal has been that although such impact assessments have been carried out at the national level, their feasibility at the intergovernmental or international level is doubtful<sup>129</sup>. The other argument is that the issues of determining impacts is a task for national governments on the basis of which they decide their negotiating aims<sup>130</sup>. While the second argument raises some important questions especially if there is a danger of capture, the first argument is fundamentally flawed and is not based on evidence. Evaluation of international rules is a routine exercise, for example, in the European Union (EU) and it is ironic that this argument was raised by an EU member, the UK. To address the second question, however, an objective assessment of whether the risks outweigh the benefits and a detailed discussion of the perceived risks would help the member states make a final decision.

That said, the implementation of DIAs in a form that ensures that there are no risks of policy distortion could help address the challenges over: the principle of minimum intellectual property rights; loss of balance in intellectual property policy and rules; incumbency; lack of economic analysis; and ideological international standard-setting.

### **3.1.7 Proposals on measures to ensure wider participation of civil society and public interest groups in WIPO including establishing a system of holding public hearings prior to the initiation of any norm-setting initiatives<sup>131</sup>**

The aim here is to improve the participation of public interest groups in this important policy area since their participation in WIPO has been limited<sup>132</sup>. Although the situation is slowly changing for the better, further action is needed. One proposal is to take measures to improve the participation of these groups in the two WIPO advisory commissions – the Policy Advisory Commission (PAC) and the Industry Advisory Commission (IAC). In Issues Paper 3, however, we argued that that these bodies, particularly the IAC, should be abolished altogether. That argument is still valid today<sup>133</sup>.

Although the WIPO Secretariat has sought to emphasise

that these Commissions are advisory, their influence on the Secretariat is not denied. The Director General of WIPO has formally stated that the PAC “through its... influence, had already become a fundamental part of the fabric of the international intellectual property community”<sup>134</sup>. With such statements the proposal, whose implementation should be straight-forward, needs to be taken seriously and followed through. As noted in Issues Paper 3, the PAC and IAC can be especially problematic when one considers soft law based rule-making in WIPO<sup>135</sup>.

There has not been any strong opposition to this proposal, partly because, for public relations purposes, it is difficult for governments to publicly oppose civil society participation in processes although this does not mean that there can be no opposition. It has been argued, for example, that WIPO has an equal number of observers to member states and therefore representation by civil society is adequate<sup>136</sup>. This argument, however, ignores the asymmetry between industry groups and public interest groups which is the problem that is sought to be addressed by the proposal.

Another specific proposal, which is limited to norm-setting and the participation of public interest groups in those processes, is for public hearings. This proposal has been obliquely opposed though not strongly. This is a straight-forward proposal which could be easily implemented. Public hearings can take place in many different ways and for an organisation that holds many seminars and workshops, it should not be difficult to organise specific international conferences with balanced representation to have a debate and discussion on proposed treaties.

The implementation of the proposals in this cluster will no doubt address the challenges related to: the loss of balance in intellectual property policy and rules; the incumbency problem; and the undemocratic and ideological international standard-setting.

### **3.1.8 Proposal to formulate and adopt principles and guidelines for norm-setting activities in WIPO<sup>137</sup>**

Owing to the historical bias in WIPO against development-oriented rule making, this proposal calls for certain broad principles and guidelines to be adopted to ensure that whenever norm-setting takes place there is sufficient attention to important public policy goals and the concerns of developing countries. The Group of Friends of Development argue that:

“Elaborating rules that effectively promote development

<sup>128</sup> Abbott, 2005, pp79 and 94-97

<sup>129</sup> See the argument of the UK at the second session of the IIM in document IIM/2/10

<sup>130</sup> See the discussions at the second session of the IIM in document IIM/2/6

<sup>131</sup> Contained in WIPO document IIM/1/4

<sup>132</sup> For an analysis of the lack of balance see Musungu and Dutfield, 2003

<sup>133</sup> See Musungu and Dutfield, 2003, p23 and Annexes 3 and 4

<sup>134</sup> Para 4 of the report of the last session of the PAC contained in document WO/GA/31/1

<sup>135</sup> See Musungu and Dutfield, 2003, pp6-7

<sup>136</sup> See the argument of the USA at the third session of the IIM in the report of the session, WIPO document IIM/3/3

<sup>137</sup> Contained in WIPO document IIM/1/4

and creative intellectual activity requires an adequate framework for negotiations and other WIPO norm-setting activities. Identifying interests behind norm-setting initiatives, assessing the costs and benefits of those initiatives in terms of sustainable development, promoting a balance between protection and dissemination of knowledge and the interests of developed and developing countries, fostering the participation of a broad range of stakeholders, and supporting the compatibility with broader international objectives and commitments constitute, in this regard, concrete and significant steps that can be taken in the context of WIPO norm-setting activities to ensure their outcome reflects development needs and concerns.<sup>138</sup>

The idea of principles and guidelines or certain other parameters including modalities is not new in international rule-making. In the WTO a similar approach has been taken, for example with respect to services negotiations<sup>139</sup>. Accordingly, subject to any shortcomings that might have been identified with this approach in WTO or elsewhere, it should be possible to move into a concrete discussion on the specific principles and guidelines.

Although further discussion and refinement may be needed, this alone is not reason to jettison the proposal. Implementation of this proposal will go a long way in addressing the challenges related to: the loss of balance in intellectual property policy and rules; the incumbency problem; fighting rather than embracing new technologies; undemocratic and ideological international standard-setting; and inadequate attention to science, technology and innovation in WIPO.

Similar to technical assistance and the access to knowledge treaty, while WIPO should be the starting point for the development and implementation of such principles, these principles on norm-setting may apply more widely. As is clear from Table 1 below, there are other UN entities which have mandates and are involved in norm-setting, for example, UNESCO, FAO and CBD where such principles would also be important. The principles and guidelines could eventually, if not immediately, also be extended to apply to norm-setting in WTO and other norm-setting entities outside of the UN system.

### *3.2 Rethinking innovation, intellectual property, and development in wider UN system*

The reform of WIPO, though critical, is not sufficient to address the challenges we face in the 21<sup>st</sup> century over innovation, development, and intellectual property. In fact, such reform is just a first step to seriously address the challenges

of governing the knowledge society. The role of other UN institutions, starting with the UN General Assembly, needs to be critically considered and their mandates and activities reformed, where appropriate. While much is being done in the UN on these issues, the impact has so far been limited. Improvements are needed at three core levels.

First, there is need to better address the substantive issues facing us in the 21<sup>st</sup> century which were examined in Part 2 above. Second, there is a critical need to better coordinate the functions and activities of the various entities to ensure that gains made, for example, in providing universal access to education and primary health care are not undermined by intellectual property policies pursued at WIPO and elsewhere. However, coordination and coherence should not mean artificial and exclusive specialisations, especially in intellectual property, in places with no core policy competence on the issues such as health, food or education that are directly affected by rules on intellectual property. Finally, better efforts should be made at integrating the activities of the UN at the country level.

It is to these three core levels that I now turn. A comprehensive review of all the activities and operations of the UN entities, however, is beyond the scope of this paper. Rather I aim to provide a snapshot of what is going on (this is done in Annex ) and seek to lay a firm basis upon which further research and analysis can be undertaken.

#### **3.2.1 Substantive contributions to addressing the challenges of the knowledge society**

The UN system of funds, programmes and specialised agencies brings together a unique wealth of expertise and resources related to innovation, development, and intellectual property. The mandates, competencies and expertise within the UN system, excluding WIPO, cover at least five, if not all the six components of policy-making at the international level – negotiations of standards, dispute settlement, research on innovation, development, and intellectual property including assessment of the impacts of rules, technical assistance and capacity building and policy advocacy.

The UN General Assembly, ECOSOC<sup>140</sup>, the ECOSOC Commission on Science and Technology for Development (CSTD), ILO, FAO, UNESCO, WHO, the International Telecommunication Union (ITU), UNIDO, UNCTAD, UNEP, the human rights bodies, and the CBD all have mandates for negotiating international instruments or norms that govern innovation, development, and intellectual property matters<sup>141</sup>. The ICJ and the human rights bodies have mandates and competencies to address dispute settlement matters<sup>142</sup>. The ECOSOC, the CSTD, ILO, FAO, UNESCO, WHO,

<sup>138</sup> See para 40 of WIPO document IIM/1/4

<sup>139</sup> See the WTO Guidelines and Procedures for the Negotiations on Trade in Services, WTO document S/L/93

<sup>140</sup> Where ECOSOC is mentioned, it includes

the regional economic commissions and other subsidiary organs except for the CSTD and the Commission on Human Rights which are specifically dealt with separately

<sup>141</sup> Norms also include soft law norms such as dec-

larations and resolutions and not just treaty rules

<sup>142</sup> The human rights bodies have mandates to examine human rights violations and complaints some of which may involve rights relevant to issues of innovation or intellectual property

ITU, UNIDO, UNCTAD, UNEP, UNDP, UNAIDS, UNRISD, UNU, the human rights bodies, and the CBD, all have mandates, competencies as well as programmes and activities relating to research and analysis on matters of innovation, development, and intellectual property. On technical assistance, the CTSD, ILO, FAO, UNESCO, WHO, ITU, UNIDO, UNCTAD, UNEP, UNDP, UNAIDS, UNRISD, UNU, the human rights bodies, and the CBD all have relevant mandates, competencies and activities<sup>143</sup>. Table 1 below shows policy-making components to which the current mandates and competencies of these key UN institutions apply.

As outlined in Annex, the various UN institutions have undertaken, and continue to undertake, significant substantive work not only on science, technology and innovation generally but on intellectual property specifically. A major challenge, however, is that because intellectual property has become an end in itself and a thing of its own, notwithstanding the significant work and important research findings that are emerging, the other UN agencies generally have not had a significant impact

on intellectual property debates. This is significant because though intellectual property may not be the central issue in innovation and development matters, developments over the years have made intellectual property a central component in efforts to control knowledge. Because intellectual property has been heavily promoted as the main driver of innovation, the lack of expertise on intellectual property law in these other institutions may also erroneously have been considered as lack of expertise on innovation issues. The reform of WIPO as proposed in the development agenda coupled with action on the part of the wider UN community can go a long way in addressing this disconnect.

Some processes currently underway could provide a basis for considering how to move forward in bringing the substantive contributions of the UN bodies to bear on the challenges that we face over the governance of innovation, development, and intellectual property in the knowledge society. One such process is the Commission on Intellectual Property, Innovation and Public Health (CIPIH) process at the WHO<sup>144</sup>. Clear-

**Table 1: Summary of the Policy-making components to which current mandates, competencies and activities of UN institutions (excluding principal organs) apply**

Mandate/programme area	CSTD	ILO	FAO	UNESCO	WHO	UNIDO	UNCTAD	UNEP	UNDP	UNAIDS	Human Rights bodies	CBD	UNRISD	UNU	WIPO
Negotiations of international instruments	●	●	●	●	●	●	●	●			●	●			●
Service provision			●		●										●
Dispute settlement											●				●
Research and analysis	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●
Technical assistance and capacity building	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●
Policy advocacy	●	●	●	●	●	●	●	●	●	●	●	●	●		●

<sup>143</sup> There are also other programmes such as UNAIDS which are undertaking activities related

to the implications of intellectual property in HIV/AIDS research and access to medicines.

<sup>144</sup> For details and background on the CIPIH see the section on WHO in Annex

ly, the establishment of the CIPIH had to be based on the idea that intellectual property matters, particularly as they relate to innovation, are not an exclusive preserve of WIPO. In that process, to which WIPO has been invited to contribute<sup>145</sup>, the richness of the debate on innovation and intellectual property compared to the debate in the WTO and WIPO demonstrates the stark differences in the approach taken by a body with expertise on the core area as opposed to a body, such as WIPO, which manages treaties but has no policy competence or practical experience on the specific issues being regulated<sup>146</sup>.

The CIPIH therefore shows how things could be done differently<sup>147</sup>. Irrespective of the actual outcome of the CIPIH and whether the ideas generated through the process make it into treaties in the near future, the development of concrete ideas by competent organisations such as WHO and FAO will have clear benefits. Not only will they bring the best science to bear on the problems of today but they will have a core competence and a legitimacy that WIPO does not as well as better penetration at the local level. With these research results and information, developing countries will be better placed to take a lead in policy experimentation and innovations to improve the intellectual property regimes so as to offset the overly protectionist tendencies of the industrialised countries. The overall result will be to maintain the supply of global public goods in an emerging transnational system of innovation<sup>148</sup>. Such processes are also guaranteed to better, though not necessarily fully, take into account the public interest in the innovation, development and intellectual property debates and processes.

Two things are required to ensure that there are more processes similar to, or improved versions of the CIPIH. First, efforts have to be made to address the misconception about specialisation on intellectual property. Second, other UN agencies must take affirmative actions to develop relevant expertise both on innovation issues and intellectual property. As noted above, although intellectual property may not be central in addressing innovation and development issues, the influence of intellectual property rules on the innovation processes in the knowledge society requires, at least in the short-term, intellectual property expertise in those organisations dealing in areas such as health, food and agriculture and education.

The World Summit on Information Society (WSIS) process also provides some important lessons. The issues that WSIS is dealing with are highly technical but have significant cross-

sectoral impact on society and are relevant to the work of many UN agencies just like intellectual property issues. The UN General Assembly gave the ITU the lead on this process and the ITU has taken it forward in broad inclusive fashion requiring the contribution of all relevant UN agencies and attracting attention from various levels of policy-making. Clearly, given the multiplicity of actors, interests and the scope of the impacts of these policies and the UN entities involved, this may ultimately be the way to proceed.

A similar process could be launched by the UN General Assembly to address the issues of innovation, development and intellectual property in the knowledge society<sup>149</sup>. Building on what has started in WIPO under the development agenda and other processes such as the CIPIH, the resolutions of the human rights bodies and the work of programmes such as UNDP, there is an opportunity to move these issues up on the agenda. Such a process could at the very least ensure that intellectual property issues in the UN are dealt with in the broader context of science, technology and innovation. The political impetus for such a move already exists at the level of heads of state and government of at least 130 of the Members of the UN. At the recently concluded Second South Summit, the heads of states and government of G-77 and China adopted the Doha Declaration and the Doha Plan of action both of which include important commitments and action points on innovation, development, and intellectual property<sup>150</sup>.

Apart from what can be done within the current structure of the UN, the UN reform process should also address the challenges in this area. The question is how? One way might be to consider the potential of the Commission on Science and Technology for Development (CSTD) and UNCTAD to play a key role in strengthening science and technology advice in the UN system<sup>151</sup>. The proposal by the Secretary-General for annual ministerial level assessments of progress towards agreed development goals under the auspices of ECOSOC and for ECOSOC to serve as a high-level development cooperation forum<sup>152</sup> could be a basis for considering how to position these two entities to better contribute substantively.

### **3.2.2 Coordinating UN engagement on innovation, development, and intellectual property**

The major reason why all the work undertaken in the UN on these issues has not had sufficient impact is the lack of

<sup>145</sup> See the submission by WIPO to the CIPIH on incremental innovations, available at <http://www.who.int/intellectualproperty/submissions/en/>. Last accessed on 30 July 2005

<sup>146</sup> See the range of studies commissioned by the CIPIH, the level of policy discussions and the range of stakeholders involved

<sup>147</sup> Although the final outcome of the process and its usefulness is not yet known, the key point is that there is a multidisciplinary debate taking place in the institution which is the policy centre on issues of public health

<sup>148</sup> Maskus and Reichman, 2004, p279

<sup>149</sup> Pushing through such an agenda at the UN General Assembly would be in line with the proposals by the Secretary-General that the Assembly should have its authority restored and should give focus to its substantive agenda by concentrating on the major substantive issues of the day (see para 161 of UN document A/59/2005). The issues of innovation, development and intellectual property are clearly key substantive issues of the 21st century

<sup>150</sup> For details of the Summit which took place in Doha, Qatar from 12-16 June 2005 see the

G-77 website at <http://www.g77.org/>. Under the Declaration, for example, the heads of state and government urge the September UN General Assembly discussions to "work expeditiously towards integrating the development dimensions in the rule making in the intellectual property regime that is development oriented and that facilitates the transfer of technology and knowledge in developing countries..." (para 15(xiii))

<sup>151</sup> See Juma and Yee-Cheong, 2005, p160

<sup>152</sup> See paras 171 to 180 of UN document A/59/2005 on the proposed reforms on ECOSOC

coordination of the programme activities and policy research in the UN system. The disconnect has been particularly devastating with WIPO's continued pursuit of the promotion of intellectual property around the world despite the extensive research work generated by other UN agencies raising serious problems with the system. According to the Secretary-General, the UN, more than ever before, needs to develop and implement its policies in the economic, social and cultural fields in a coherent manner<sup>153</sup>.

The key question is therefore not so much the necessary work being done within the UN but how to organise the activities of these organisations to ensure maximum impact. As already noted, the specialisation approach has made it particularly difficult to ensure coherence in the area of innovation, development, and intellectual property. The reforms proposed for ECOSOC and referred to above in section 3.2.1 will certainly help address this situation but they are not enough.

Apart from the reforms of the UN General Assembly and ECOSOC, specific attention needs to be given to the role of UNCTAD and CTSD. UNCTAD, in particular, stands in a special position on these issues. Apart from its mandate and its designation as coordinating agency on science, technology and innovation issues, UNCTAD is charged with providing the intellectual support to the CTSD. However, over the years the role of UNCTAD has been significantly eroded and it is not clear that the proposed UN reforms would address this problem. Apart from outside pressures, there is currently a general haphazardness to the way UNCTAD is handling intellectual property issues. The work in the joint project with International Centre for Trade and Sustainable Development (ICTSD) is, for example, disconnected from the work on free and open source software as well as on traditional knowledge, all of which are carried out by different divisions. Developing countries in particular should consider whether UNCTAD can continue to effectively play this important role and if so, how to organise it to do so effectively, and if not, then who can play that role. This might be the key question in the long-term.

In this regard, the Secretary-General has also suggested that in the long-term the problem of coordination will have to be addressed by more radical reform<sup>154</sup>. Such reform, he suggests, could include grouping various UN agencies, funds and programmes into tightly managed entities dealing respectively with development, the environment and humanitarian action. The reform might also involve eliminating or merging the agencies, programmes and funds where there is complementary or overlapping mandates and expertise. In the area

of innovation, development, and intellectual property it is not inconceivable that entities such as WIPO may be brought under more direct supervision by the CSTD.

Coherence and coordination in the UN is, however, a double-edged issue. There is just so much that the Secretariats of UN organisations and other actors can do. Ultimately it comes down to member states. Due to the incumbency problem in this area, disconnected participation by developing countries in international affairs may be seen as a good thing for developed countries. This is not, however, the case for developing countries. Efforts will therefore have to be made by individual countries to address the major problem of lack of coordination and coherence within and between developing countries<sup>155</sup>. Indeed, the UN Secretary-General has also emphasised this issue in his report on UN reform. In paragraph 200, he calls upon member states to coordinate their representatives on the governing bodies of various UN agencies to make sure that they pursue a coherent policy in assigning mandates and allocating resources<sup>156</sup>.

In addition to the measures for improvements that have been suggested over the years<sup>157</sup>, thought should also be given by these countries to emerging theoretical models such as the nodal governance approach<sup>158</sup>. This model, which could be modified as appropriate, is being developed based on quite a deep understanding of the tactics of the main drivers of the current global ratcheting up of intellectual property standards. Only with well thought out strategies and such a deep understanding of the organisational frameworks of the incumbents can developing countries hope to make headway in this area.

### 3.2.3 The role of the wider UN at the country level

Ultimately, whatever is done at the international level has to be applied locally. Good policy-making also requires that international discussions and negotiations are guided by local requirements in different countries. Thus, in addressing the challenges of innovation, development, and intellectual property, the role of the UN entities at the national and local level needs to be examined. While the international influence of WIPO may be considerable, its influence on the key players on development at the country level in developing countries is extremely limited compared to, for example, the UNDP.

What then needs to be done in rethinking the UN coordination mechanisms and their links to the country level mechanisms? A start could be made with the resident coordinator system in a country and the UN Development Group (UNDG), which operates at a UN system wide level. Taking into account the

<sup>153</sup> See document A/59/2005 on system coherence

<sup>154</sup> See para 197 in UN document A/59/2005

<sup>155</sup> See Abdel Latif, 2005

<sup>156</sup> See UN document A/59/2005

<sup>157</sup> See eg Abdel Latif, 2005

<sup>158</sup> See Drahos, 2004 where he discusses how the nodal governance approach which has so successfully been used by the pharmaceutical industry to ratchet up global standards could

apply to traditional knowledge. This approach could be considered more generally as well

<sup>159</sup> See paras 199 – 201 in UN document A/59/2005

proposed reforms by the Secretary-General<sup>159</sup>, this system can play a particularly important role in addressing the challenges outlined in Part 2 of this paper. To do this, however, there will need to be a better understanding of the impact of intellectual property on the development efforts of the UN. Such an understanding will ensure that the UNDG and the resident coordinator system pay closer attention to the activities of, for example, WIPO in a country. A more coherent approach by the UN will also be an important step in helping the countries themselves to start addressing these issues in a comprehensive manner. Finally, this will also ensure that the extensive work undertaken on innovation, development, and intellectual property by other UN agencies reach the small, but influential, intellectual property community, especially intellectual property offices at the country level, which appear to be currently insulated from the wide research available from the UN.

### *3.3 The role of Non-UN international institutions*

Though the collectivity of the UN entities has the biggest contribution to make in tackling the challenges we face in fashioning a fair and balanced international governance system on innovation, development, and intellectual property, other multilateral institutions can make important contributions. Institutional limitations in the UN as well as the difficulties such as those that face UNCTAD mean that there is space for others to contribute. Key institutions that are currently important players in this area include multilateral institutions such as the WTO and the World Bank, regional economic institutions as well as intergovernmental think tanks such as the OECD and the South Centre. I briefly examine here the contributions that these various institutions can make in the efforts to build a better governance system for innovation, development, and intellectual property<sup>160</sup>.

The WTO is probably the most important among the non-UN institutions. The TRIPS Agreement concluded under its auspices was the most radical change in the international intellectual property system and the related issues of innovation and development regulation in the 20<sup>th</sup> century. The changes introduced by the TRIPS Agreement underlie, to a major extent, the current tensions in the international system. Although there are always temptations to argue that TRIPS should be taken out of the WTO and put into WIPO, ‘where it belongs’, such a move, apart from being very unlikely, will also not address the problem. This approach assumes that WIPO has the exclusive competence on intellectual property. As the preceding discussion in this paper shows this is a false assumption.

The argument also fails to take into account the origins and development of the international intellectual property system. Foreign trade considerations have always underpinned the developments in international intellectual property standards starting with the Paris Convention in 1883 and the Berne Convention in 1886. To think that somehow trade considerations will be eliminated from intellectual property standard-setting by taking TRIPS out of the WTO is to oversimplify. As an economic institution, it is also difficult to see why, inherently, the WTO cannot deal with intellectual property. Finally and most importantly, to the extent that the TRIPS Agreements’ minimum standards principle coupled with the dispute settlement system is one of the key challenges of our time, a reform of the governance architecture for innovation, development, and intellectual property must address the WTO.

From a strategic standpoint, the WTO and TRIPS may have been a blessing in disguise. Because of TRIPS and the bluntness given to its rules due to the use of trade-based retaliation measures, civil society has emerged to play a critical role in the debate on intellectual property and development<sup>161</sup>. TRIPS issues also underpin the growing intra and inter-institutional dialogue at the multilateral level on intellectual property issues<sup>162</sup>. The trade-related concept introduced by TRIPS has helped other institutions, especially within the UN such as WHO, to make a relatedness argument as a basis of their work. Discussing governance reform in the context of TRIPS therefore offers an important entry point and opportunity to galvanise public opinion. At the same time, although the WTO dispute settlement system remains largely untested in terms of its contribution to addressing some of the challenges of the 21<sup>st</sup> century governance of intellectual property, it may offer some hope. Based on a review of the few cases on TRIPS that have been litigated it is possible to suggest that there is scope to use the system, with appropriate modifications, such as collective retaliation, to address some of the actions of large trading powers such as the USA. The gains that have been made on the negotiation front by developing countries with respect to TRIPS and CBD compared to progress at WIPO on these issues, for example, also suggest that WTO may be an important player on the reform agenda.

Consequently, among the components that constitute innovation, development, and intellectual property policy-making at the international level, the WTO can contribute in important ways with respect to negotiations of new standards or a renegotiation of TRIPS standards and rules, dispute settlement, and to a limited extent research on innovation, development, and intellectual property, and technical assistance.

The World Bank, the OECD and the South Centre can also

<sup>160</sup>A fuller analysis of the reforms needed in non-UN international institutions so that they can contribute effectively is beyond the scope of this paper, though I consider that such an analysis is critical. A discussion on reforming the TRIPS structure based on the idea that different subject matter and industries as well as countries

need to be dealt with differently has started within academic circles. See eg, Abbott 2005

<sup>161</sup>In addition to the role of civil society organisations at WTO, it is civil society organisations that have been most active on these issues in other international fora such as WIPO, WHO and FAO as well as on free trade agreements,

which came into this debate mostly because of TRIPS. The TRIPS debate has also galvanised funding for public interest groups on intellectual property issues more than ever before

<sup>162</sup>Abbott, 2005, p79. The creation of the CIPHI at the WHO, for example, arose out of TRIPS-related debates in the World Health Assembly in WHO

all play an important role. The significant research work that has been undertaken by these institutions in the last few years has been particularly critical in providing impetus to the debate on these issues<sup>163</sup>. Though one may not agree with all the findings of these institutions, their efforts to undertake evidence-based policy research will be critical in the reform process. As intergovernmental institutions, their research findings carry important weight not only among their members but also within the UN and WTO system. Although the three institutions and other similar institutions suffer from some of the same problems that the UN agencies suffer from, they are much more dynamic. This, however, is not to suggest that these institutions may themselves not be in need of reform for them to contribute to the process.

Finally, there are important contributions to be made in the policy debate and in areas such as technical assistance by non-governmental organisations, particularly civil society and various regional economic institutions. The advocacy role of civil society is absolutely essential on moving the reform agenda forward in WIPO, in the UN more generally and in the other international institutions such as the WTO, the World Bank, OECD and the South Centre. This role is also critical at the country level to ensure that the resident coordinator system and the UNDG appropriately focus on intellectual property issues. Regional institutions such as the Andean Community can also play an important role in integrating the approach to innovation, development, and intellectual property<sup>164</sup>.

## 4. Conclusion

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Innovation, development, and intellectual property policy is just too important in today's knowledge society to be left to the bureaucracies of intellectual property organisations such as WIPO or intellectual property offices at the country level. Critical engagement is required from all the relevant UN agencies and entities, particularly those referred to in Annex, to address the key challenges we face in governing the knowledge society in the 21st century. Intellectual property is not like health, education, food or agriculture. It is a form of business regulation not a fundamental aspect of human needs. As such it is a subordinate activity which should be modified, reviewed and restructured according to how it helps or hinders meeting human needs. This is why those bodies dealing with health, food, education and the like should have the internal competence and ability to assess intellectual property rules and their impact on the fundamentals and then play a major role in promoting the kind of business regulation that will help meet their fundamental development aims.

This in essence is why WIPO should not be the only, nor even the lead, UN agency dealing with intellectual property matters. Its lead function should remain in the technical areas required to effectively manage the implementation of patents, copyrights and other elements of an intellectual property regime. Deciding on the shape and structure of the regime, the detailed rules that shape it, the balance of interests to be met and the measures by which it is judged requires a far wider range of inputs than those from legal and technical groups that make up the intellectual property community and which dominate the practice of WIPO.

This is a historical moment in the UN and we must seize the opportunity. It will be a long time to come before humanity has such a fortunate coincidence of events. 2005 and the next few years is the period when the implementation of the MDGs is being reviewed, when the most comprehensive and far-reaching reform of the UN since its creation 60 years ago is being undertaken, when the Doha development agenda is entering a critical phase and when debate on a WIPO development agenda has began. While all these processes provide opportunities, positive results on the issue of innovation, development, and intellectual property will only come from an integrated approach not only by UN agencies but also by individual countries, particularly the developing and least-developed among them.

The following set of priorities and milestones will be important parameters in moving forward the debate and action on reforming knowledge governance and rethinking the role of the UN in that process:

- The idea of specialisation in the UN over intellectual property must be radically rethought. In particular, it will have to be clearly understood that while WIPO has a role to play and its reform is important, such reform is insufficient to address the challenges of innovation, development, and intellectual property in 21st century.
- The challenges highlighted in Part 2 of this paper as well as other related challenges will have to be better understood not only by institutions such as WIPO but more broadly by all relevant UN entities and by countries, especially developing countries.

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<sup>163</sup> For information about the Bank and its intellectual property and related research see <http://www.worldbank.org>

for OECD see <http://www.oecd.org> and for South Centre <http://www.southcentre.org>

<sup>164</sup> For discussion on this aspect see Musungu et al, 2004

- The key proposals in the WIPO development agenda examined above in section 3.1 will have to be vigorously pursued and implemented within the next 5 years at the latest if WIPO is to contribute more usefully to achieving the MDGs by 2015.
- The reform of the UN and the review of the MDGs implementation will have to result in better substantive outputs, coordinated engagement of the UN entities on the issues of innovation, development, and intellectual property and an amplified role of the UNDG and resident coordinator system in addressing these issues if the governance framework is to improve.
- Non-UN international institutions, regional institutions and NGOs will also have an important role to play. Civil society , in particular will have an important role to play, in ensuring that there is sufficient reform not only within the UN but in other institutions including the WTO, the World Bank, OECD, South Centre and others.
- For all these reforms to happen, a key factor will be better coordination and coherence within and among developing countries, which are currently the only ones investing in protection of the public interest in the area of innovation, development, and intellectual property. Although these efforts are of immediate interest for these countries, they also constitute an important global service.

# Annex: Key UN bodies and the mandates relevant to innovation, development, and intellectual property

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## The principal organs

### *The UN General Assembly*

The General Assembly is the main deliberative, policy-making and representative organ of the United Nations. It consists of representatives of all Member States, each of which has one vote. Among other functions and powers the General Assembly may discuss any questions or any matters within the scope of the Charter or relating to the powers and functions of any organs provided for in the Charter<sup>165</sup>. The General Assembly can also initiate studies and make recommendations for: promoting international co-operation in the political field and encouraging the progressive development of international law and its codification; promoting international co-operation in the economic, social, cultural, educational, and health fields; and, assisting in the realisation of human rights and fundamental freedoms for all<sup>166</sup>. The Assembly also receives and considers the reports of other organs of the UN<sup>167</sup>.

The decisions of the Assembly are not legally binding but carry the weight of world opinion on major international issues, as well as the moral authority of the world community. In his proposal for reform the Secretary General has proposed to revitalise the General Assembly by among other things speeding up its deliberative process and giving a focus to the substantive agenda of the General Assembly by concentrating on addressing the major issues of the day<sup>168</sup>.

### *Economic and Social Council (ECOSOC) and The Commission on Science and Technology for Development (CSTD)*

ECOSOC is established under article 61 of the UN Charter<sup>169</sup>. Its functions, which are set out in article 62, include: making or initiating studies and reports about international economic, social, cultural, educational, health, and related matters and making recommendations about any such matters to the General Assembly, to the Members of the UN, or to the specialised agencies concerned; making recommendations for the promotion of respect for, and observance of, human rights and fundamental freedoms for all; and preparing draft conventions for submission to the General Assembly about matters falling within its competence. Under article 64 of the Charter, ECOSOC can obtain regular reports from the specialised agencies generally and with respect to the steps taken to implement its recommendations. It can also communicate its observations on these reports to the General Assembly. ECOSOC's functions therefore involve coordination, policy review and policy dialogue.

In the reform proposals, the Secretary-General observes, however, that ECOSOC has often been relegated to the margins of global economic and social governance<sup>170</sup>. To address this situation he proposes that that ECOSOC should serve as a high-level development cooperation forum<sup>171</sup>. The Secretary General hopes that ECOSOC will start to assert its leadership in driving a global development agenda and be able to provide directions to various entities throughout the UN system.

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<sup>165</sup> See article 10 of the UN Charter

<sup>166</sup> See article 13 of the Charter

<sup>167</sup> See article 15 of the Charter

<sup>168</sup> See paras 158-164 of UN document A/59/2005

<sup>169</sup> For further information about ECOSOC and its activities see <http://www.un.org/docs/ecosoc/>. Last accessed on 30 July 2005

<sup>170</sup> See para 165 of UN document A/59/2005

<sup>171</sup> See para 176 of document A/59/2005

ECOSOC has several functional commissions including the CSTD<sup>172</sup>. It was established in 1992 as a result of the restructuring of the UN in the economic, social and related fields<sup>173</sup>. Through this restructuring, the General Assembly abolished the former Intergovernmental Committee on Science and Technology for Development (IGCSTD) and its subsidiary body, the Advisory Committee on Science and Technology for Development (ACSTD) and replaced them by the CSTD. Both the IGCSTD and ACSTD were created at the time of the UN Conference on Science and Technology for Development, held in Vienna in 1979.

The Commission was established primarily to provide the General Assembly and ECOSOC with high-level advice on relevant issues through analysis and appropriate policy recommendations or options in order to enable those organs to guide the future work of the UN, develop common policies and agree on appropriate actions. The Commission acts as a forum for:

- the examination of science and technology questions and their implications for development;
- the advancement of understanding on science and technology policies, particularly for developing countries; and,
- the formulation of recommendations and guidelines on science and technology matters within the UN system.

The Commission has 33 Member States elected by ECOSOC for a term of four years. Experts nominated by their respective governments are expected to possess the necessary qualifications and professional scientific knowledge. The Commission has eight members from African states; seven members from Asian states; six members from Latin American and Caribbean states; four members from Eastern European states; and eight members from Western European and other states.

The Commission's 2003-2004 work programme was based on the theme of promoting the application of science and technology to meet the MDGs. The work programme included: improving the policy environment for the application of science and technology to development; strengthening basic and applied research in developing countries and international scientific networking; strengthening technology support institutions and science advisory mechanisms; and, promoting universal Internet access at affordable costs.

Finally, five regional economic commissions also operate under ECOSOC, namely: Economic Commission for Africa (ECA)<sup>174</sup>, Economic Commission for Europe (ECE)<sup>175</sup>, Economic Commission for Latin America and the Caribbean (ECLAC)<sup>176</sup>, Economic and Social Commission for Asia and the Pacific (ESCAP)<sup>177</sup>, Economic and Social Commission for Western Asia (ESCWA)<sup>178</sup>.

## *The International Court of Justice (ICJ)*

The ICJ is the principal judicial organ of the UN. All members of the UN are *ipso facto* members of the Court. It functions in accordance with the Statute of the Court<sup>179</sup>. Apart from its powers to deal with cases the Court also plays an important role in providing advisory opinions to the General Assembly and the Security Council and other organs of the UN and specialised agencies in certain circumstances<sup>180</sup>.

<sup>172</sup> The Human Rights Commission dealt with below is also a functional commission of ECOSOC and is only dealt with separately for sake of clarity.

<sup>173</sup> See <http://stdev.unctad.org/un/uncstd.html#Preparation>. Last accessed on 30 July 2005

<sup>174</sup> See <http://www.uneca.org/>

<sup>175</sup> See <http://www.unece.org/>

<sup>176</sup> See <http://www.eclac.org/>

<sup>177</sup> See <http://www.unescap.org/>

<sup>178</sup> See <http://www.escwa.org.lb/>

<sup>179</sup> See article 92 of the Charter

<sup>180</sup> See article 96 of the Charter

# The specialised agencies

## *International Labour Organisation (ILO)*

The ILO was founded in 1919 and is the only major body that survived the demise of the League of Nations<sup>181</sup>. It is a specialised agency of the UN charged with formulating labour standards through conventions and recommendations. One of ILO's conventions is Convention (No 169) Concerning Indigenous and Tribal Peoples in Independent States<sup>182</sup>. This Convention has relevance to some of the issues being discussed in the intellectual property debates such as traditional knowledge.

## *Food and Agriculture Organisation (FAO)*

The FAO was established in 1945 as a specialised UN agency. Its purposes are to raise levels of nutrition, improve agricultural productivity, better the lives of rural populations and contribute to the growth of the world economy<sup>183</sup>. Its functions, as set out in Article 1 of its Constitution, include:

- (a) to collect, analyse, interpret and disseminate information relating to nutrition, food and agriculture;
- (b) to promote and, where appropriate, recommend national and international action with respect to -
  - scientific, technological, social and economic research relating to nutrition, food and agriculture,
  - the improvement of education and administration relating to nutrition, food and agriculture, and the spread of public knowledge of nutritional and agricultural science and practice,
  - the conservation of natural resources and the adoption of improved methods of agricultural production,
  - the improvement of the processing, marketing and distribution of food and agricultural products,
  - the adoption of policies for the provision of adequate agricultural credit, national and international,
  - the adoption of international policies with respect to agricultural commodity arrangements; and,
- (c) to furnish such technical assistance as governments may request.

Currently, in addition to its significant research and technical assistance work, the FAO also administers the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA)<sup>184</sup> which establishes a framework for the conservation and sustainable use of plant genetic resources for food and agriculture and, in particular, provides for a multilateral system for facilitated access and benefit sharing for selected plant genetic resources. The Treaty framework provides an important pillar in the world agricultural innovation system. Conceptually, the Treaty is based on the idea of sharing plant genetic resources for food and agriculture and has an anti-appropriation clause where no intellectual property should be granted over resources as received from the system.

There are also on-going discussions within the Commission on Genetic Resources for Food and Agriculture on the possibility of an international framework on animal genetic resources as well as preliminary discussions on effective international recognition of globally important agricultural heritage systems.

## *United Nations Educational, Scientific and Cultural Organisation (UNESCO)*

UNESCO came into being in 1946 when its Constitution, signed in November 1945, came into force<sup>185</sup>. The purpose of the Organisation is to contribute to peace and security by promoting collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of law and for human rights and fundamental freedoms. To do this UNESCO is expected to, among others:

- formulate and adopt international agreements as may be necessary to promote the free flow of ideas by word and image;
- give fresh impulse to popular education and to the spread of culture; and,

<sup>181</sup> See <http://www.ilo.org/public/english/about/index.htm>. Last accessed on 30 July 2005

<sup>182</sup> The text of the Convention is available at <http://www.unhchr.ch/html/menu3/b/62.htm>. Last accessed on 30 July 2005

<sup>183</sup> See the Preamble of the FAO Constitution and also <http://www.fao.org/>

<sup>184</sup> The FAO Conference, at its Thirty-first Session (November 2001) adopted the Treaty through Resolution 3/2001. For further information on the treaty as well as the status of ratification, approval, acceptance and accession see <http://www.fao.org/Legal/TREATIES/033s-e.htm>. Last accessed on 30 July 2005. Note, however, that plant genetic resources and related intellectual

property issues have been part of FAO's work since the days of the International Undertaking on Plant Genetic Resources in 1983.

<sup>185</sup> See also [http://portal.unesco.org/en/ev.php-URL\\_ID=15006&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=15006&URL_DO=DO_TOPIC&URL_SECTION=201.html)

- maintain, increase, and diffuse knowledge.

Under its auspices, at least 26 legal instruments<sup>186</sup> have been concluded ranging from the Agreement for Facilitating the International Circulation of Visual and Auditory Materials of an Educational, Scientific and Cultural Character in 1948 to the Universal Copyright Convention in 1952, the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (jointly with WIPO and ILO) in 1961, the Convention Concerning the Protection of the World Cultural and Natural Heritage in 1972 to the Convention for the Safeguarding of the Intangible Cultural Heritage in 2003<sup>187</sup>. Currently, there are also on-going negotiations on a Draft Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions.

## *World Health Organisation (WHO)*

WHO which came into being in 1948 as a specialised UN agency was established with the objective of working towards the attainment by all peoples of the highest possible level of health<sup>188</sup>. To meet this objective it was tasked with at least 22 functions including:

- to act as the directing and coordinating authority on international health work;
- to stimulate and advance work to eradicate epidemic, endemic and other diseases;
- to promote, in co-operation with other specialised agencies where necessary, the improvement of nutrition, housing, sanitation, recreation, economic or working conditions and other aspects of environmental hygiene;
- to promote co-operation among scientific and professional groups which contribute to the advancement of health;
- to propose conventions, agreements and regulations, and make recommendations with respect to international health matters and to perform such duties as may be assigned thereby to the Organisation and are consistent with its objective;
- to promote and conduct research in the field of health; and,
- to develop, establish and promote international standards with respect to food, biological, pharmaceutical and similar products.

Currently, in addition to its significant research and fieldwork related to the development of medicines, WHO has been working on issues related to intellectual property and public health. In this context, the WHO Secretariat participated actively in the debates leading to the adoption of the Doha Declaration on the TRIPS Agreement and Public Health as well as the follow-up processes and negotiations. The organisation has also been involved in a significant amount of work at the regional and country level including the provision of technical assistance on matters on intellectual property and public health.

There have also been significant discussions on intellectual property and public health issues in the last three or so World Health Assemblies (WHA), WHO's highest decision making body. These discussions culminated in 2003 with the Resolution on Intellectual Property Rights, Innovation and Public Health mandating the formation of the Commission on Intellectual Property Rights, Innovation and Public Health (CIPIH)<sup>189</sup>. The CIPIH's mandate is to:

“Collect data and proposals from different actors involved and produce an analysis of intellectual property rights, innovation, and public health, including the question of appropriate funding and incentive mechanisms for the creation of new medicines and other products for the diseases that disproportionately affect developing countries...”

Finally, there is also important work that is being undertaken under the Human Genetics Programme on the impact of gene patents on access to genetic technologies in developing countries as a follow-up to the Genomic and World Health report which identified intellectual property as a factor affecting the accessibility of the results of genomic research<sup>190</sup>. It is under this programme that in 2005 the Report on “Genetics, Genomics and the Patenting of DNA: Review of Potential Implications for Health in Developing Countries” was prepared<sup>191</sup>.

<sup>186</sup> For full details on these instruments see the UNESCO website, given in footnote above

<sup>187</sup> Some of the Conventions such as the Rome Convention, however, are administered by WIPO

<sup>188</sup> See <http://www.who.int>

<sup>189</sup> See <http://www.who.int/intellectualproperty/en/>. Last accessed on 30 July 2005

<sup>190</sup> The Advisory Committee on Health Research, 2002

<sup>191</sup> See Human Genetics Programme, WHO, 2005

## *International Telecommunication Union (ITU)*

The ITU which predates the UN became a specialised agency in 1947<sup>192</sup>. The role of ITU is to provide a forum for coordinating the operation of telecommunication networks and services and advance the development of communications technology. Under its Constitution the ITU has a number of purposes including:

- to maintain and extend international cooperation between all its Member States for the improvement and rational use of telecommunications of all kinds;
- to promote and offer technical assistance to developing countries in the field of telecommunications, and also to promote the mobilisation of the material, human and financial resources needed to improve access to telecommunications services in such countries;
- to promote the development of technical facilities and their most efficient operation, with a view to improving the efficiency of telecommunication services, increasing their usefulness and making them, so far as possible, generally available to the public;
- to promote the extension of the benefits of new telecommunication technologies to all the world's inhabitants; and,
- to promote, at the international level, the adoption of a broader approach to the issues of telecommunications in the global information economy and society, by cooperating with other world and regional intergovernmental organisations and those non-governmental organisations concerned with telecommunications.

Apart from its various activities which relate to intellectual property and to innovation and development together with the UN, the ITU has been playing an important role in the World Summit on Information Society (WSIS)<sup>193</sup>. The WSIS process, which takes place in two phases, is a critical process in the information and communications technology (ICT) sector.

## *United Nations Industrial Development Organisation (UNIDO)*

The constitution of UNIDO to be set up as specialised agency of the UN was adopted in 1979. In this UNIDO's primary objective was established as the promotion and acceleration of industrial development in the developing countries with a view to assisting in the establishment of a new international economic order as well as the promotion of industrial development and co-operation on global, regional and national, and sectoral levels<sup>194</sup>. Among the 14 functions of UNIDO under its constitution are to:

- encourage and extend, as appropriate, assistance to the developing countries in the promotion and acceleration of their industrialisation, in particular in the development, expansion and modernisation of their industries;
- promote and encourage the development and use of planning techniques, and assist in the formulation of development, scientific and technological programmes and plans for industrialisation;
- encourage and assist in the development of an integrated and interdisciplinary approach towards accelerated industrialisation of the developing countries; and,
- promote, encourage and assist in the development, selection, adaptation, transfer and use of industrial technology, with due regard for socio-economic conditions and specific requirements of industry concerned with special reference to the transfer of technology from industrialised to developing countries as well as among developing countries.

UNIDO has undertaken and continues to undertake critical work relating to innovation and development including addressing the relevant intellectual property issues. The organisation, among others, has programmes on industrial governance, investment and technology promotion and industrial competitiveness. In a new book, the outgoing UNIDO Director-General addresses the issue of economic development and UN reform in the context of UNIDO's work where intellectual property issues are discussed<sup>195</sup>.

<sup>192</sup> See <http://www.itu.int/aboutitu/index.html>

<sup>193</sup> See <http://www.itu.int/wsisi/>. The WSIS

process was initiated by UN Resolution 56/183 of 21 December 2001

<sup>194</sup> See <http://www.unido.org/>

<sup>195</sup> Magarinos, 2005

# Programmes and Funds

## United Nations Conference on Trade and Development (UNCTAD)

UNCTAD was established by UN General Assembly resolution in 1964 with, *inter alia*, the principal functions to:

- promote international trade, especially with a view of accelerating economic development, particularly trade between countries at different stages of development, between developing countries and between countries with different systems of economic and social organisation, taking into account the functions performed by the existing international organisations;
- promote principles and policies on international trade and related problems of economic development;
- make proposals for putting the said principles and policies into effect and to take such other steps within its competence as may be relevant to this end, having regard to differences in economic systems and stages of development;
- generally, to review and facilitate co-ordination of the activities of other institutions within the UN systems in the field of international trade and related problems of economic development, and in this regard to co-operate with the General Assembly and ECOSOC; and,
- initiate action, where appropriate, in co-operation with the competent organs of the UN for the negotiation and adoption of multilateral legal instruments in the field of trade, with due regard to the adequacy of existing organs of negotiation and without duplication of their activities<sup>196</sup>.

In December 2002, the UN Executive Committee for Economic and Social Affairs designated UNCTAD as the lead entity for science, technology, and innovation within the UN system<sup>197</sup>. In addition, UNCTAD provides the intellectual support to the CSTD, which is the main organ in ECOSOC for science and technology.

UNCTAD has, over the years, played a key role in international trade and intellectual property matters and has, in particular, conducted fundamental work relating to intellectual property and development including the relationship between intellectual property and technology transfer<sup>198</sup>. UNCTAD also played an important role during the negotiations between the UN and WIPO about the Agreement between the UN and WIPO. In the period leading to the adoption of the TRIPS Agreement and in many respects thereafter, UNCTAD's work on intellectual property has, however, been somewhat limited. This trend has been attributed to there being a deliberate effort by key players to sideline UNCTAD on these issues because UNCTAD had served as an important forum for developing countries to develop strategies and analytical work which demonstrated the serious negative consequences for technology development and related objectives that arose from the existing intellectual property regimes<sup>199</sup>.

UNCTAD's current work related to intellectual property is in the context of other policy areas and/or in collaboration with other organisations. For example, there is significant work focusing on traditional knowledge as well as on free/open source software and related issues. On the collaboration side, UNCTAD has over the last few years conducted a quite successful joint capacity building project on intellectual property rights and sustainable development with the International Centre for Trade and Sustainable Development (ICTSD). This project has been responsible for a large number of research outputs as well as important meetings and conferences such as the Bellagio series on intellectual property and development<sup>200</sup>.

At UNCTAD XI, the Sao Paulo Consensus<sup>201</sup> reinforced UNCTAD's work in this area by tasking it with the role of:

- addressing issues of particular concern to developing countries and least-developed countries (LDCs) including the implementation and interpretation of TRIPS in a manner supportive of public health<sup>202</sup>;

<sup>196</sup> See <http://www.unctad.org>

<sup>197</sup> See Juma and Yee-Cheong, 2005, p160

<sup>198</sup> See UNCTAD and ICTSD, 2005 in addition to earlier work

<sup>199</sup> Braithwaite and Drahos, 2000, p68

<sup>200</sup> Among the publications that have been produced under this project are the The Resource Book on TRIPS and Development and the policy discussion paper on "Intellectual Property Rights: Implications for Development". This is in addition a significant number of issue

specific research papers. For full information about the outputs of this project see <http://www.iprsonline.org/unctadictsd/projectoutputs.htm>

<sup>201</sup> See document UN DOC. TD/410

<sup>202</sup> See para 68 of the Sao Paulo Consensus

- undertake analysis of the development dimension on intellectual property and TRIPS<sup>203</sup>; and,
- undertake analysis on trade and development aspects of open and collaborative projects, including open source software, focussing on the development dimension.

## *United Nations Environmental Programme (UNEP)*

UNEP was established by the UN General Assembly resolution in 1972<sup>204</sup> as a programme whose Governing Council would have some of the following main functions and responsibilities:

- to promote international co-operation in the field of the environment and to recommend, as appropriate, policies to this end;
- to provide general policy guidance for the direction and co-ordination of environmental programmes within the UN system; and,
- to promote the contribution of the relevant international scientific and other professional communities to the acquisition, assessment and exchange of environmental knowledge and information and, as appropriate, to the technical aspects of the formulation and implementation of environmental programmes within the UN system.

UNEP is mandated to work on a range of issues relating to intellectual property, including access and benefit sharing, technology transfer and, more generally, trade and development. UNEP's work on access and benefit sharing is carried out in support of the Convention on Biological Diversity. Central to UNEP's activities is also the development and transfer of environmentally-sound technologies and know-how. At UNEP's 23rd Governing Council, Ministers noted "that the promotion and provision of technology support and capacity-building in environment-related fields for developing countries as well as countries with economies in transition remain an important component of the work of the United Nations Environment Programme"<sup>205</sup>. Technology transfer is similarly highlighted in UNEP's Bali Strategic Plan<sup>206</sup>, which aims "to promote, facilitate and finance, as appropriate, access to and support of environmentally sound technologies and corresponding know-how, especially for developing countries as well as countries with economies in transition".

References to the development and transfer of technology also turn up in numerous decisions of UNEP's Governing Council on specific issues such as water, climate change and biodiversity. UNEP is mandated more generally to work on issues of trade and development. Its Governing Council has stressed that "the environmental perspective should be taken into account in both the design and the assessment of macro-economic policy-making" and that trade and environment policies – including presumably those relating to intellectual property – should be "mutually supportive"<sup>207</sup>.

Intellectual property related work has also been undertaken by UNEP's Division of Policy Development and Law, and the Division of Technology, Industry and Economics.

## *United Nations Development Programme (UNDP)*

UNDP was established in 1965, on the recommendation of ECOSOC, through a UN General Assembly resolution by combining the then Expanded Programme of Technical Assistance and the Special Fund in a programme to be known as the UNDP<sup>208</sup>. Probably the best known UN programme, UNDP is considered the UN's global development network, with the aim of connecting countries to knowledge, experience and resources. UNDP currently has field presence in 166 countries around the world<sup>209</sup>.

Some of the current key programme areas relevant to issues of innovation, development and intellectual property include capacity development, knowledge networking, information and communications technology, human development reports and South-South cooperation. More specifically UNDP has various programmes and activities related to innovation, development, and intellectual property. For example, both the 1999 Human Development Report, which focused on globalisation, and the 2001 Report, which focused on new technologies, addressed the questions of innovation and governance of the knowledge economy including intellectual property issues. UNDP also has an ongoing project on TRIPS and access

<sup>203</sup> See para 101

<sup>204</sup> See General Assembly Resolution 2997 (XXVII) of 1972

<sup>205</sup> The proceedings of the meeting are avail-

able at <http://www.unep.org/GC/GC23/>

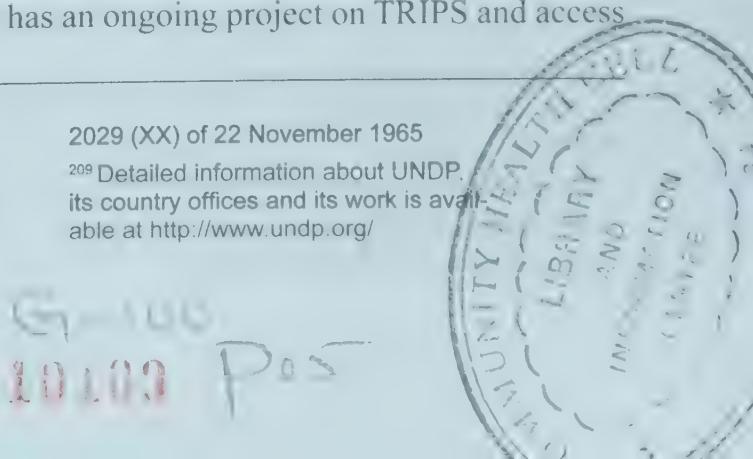
<sup>206</sup> See UNEP document UNEP/GC.23/6/Add.1

<sup>207</sup> See UNEP governing Council Decision 21/14

<sup>208</sup> See General Assembly Resolution

2029 (XX) of 22 November 1965

<sup>209</sup> Detailed information about UNDP, its country offices and its work is available at <http://www.undp.org/>



to HIV/AIDS generic medicines<sup>210</sup>. Other related work by UNDP includes publications on making global trade work for people<sup>211</sup> and on global public goods<sup>212</sup>.

### *Joint United Nations Programme on AIDS (UNAIDS)*

UNAIDS' mission is to lead, strengthen and support an expanded response to HIV and AIDS that includes preventing transmission of HIV, providing care and support to those already living with the virus, reducing the vulnerability of individuals and communities to HIV and alleviating the impact of the epidemic<sup>213</sup>. It has ten co-sponsor organisations namely: Office of the United Nations High Commissioner for Refugees (UNHCR), United Nations Children's Fund (UNICEF), the World Food Programme (WFP), UNDP, UNESCO, WHO, the World Bank, United Nations Population Fund (UNFPA), United Nations Office on Drugs and Crime (UNODC) and ILO.

Though focused on HIV/AIDS, UNAIDS has been involved in work and debates on innovation and development including the debates on intellectual property and the effects on access to HIV/AIDS treatments. One of the important contributions of UNAIDS in this area has been the development, together with the OHCHR, of the International Guidelines on HIV/AIDS and Human Rights<sup>214</sup>. Revised Guideline 6, in particular, provides up-to-date policy guidance that is based on current scientific progress, international law and best practice at country level including guidance on intellectual property issues.

## **Research and Training Institutes**

### *United Nations Research Institute for Social Development (UNRISD)*

UNRISD was established in 1963 to conduct research into problems and policies of social development and relationships between various types of social development and economic development during different phases of economic growth<sup>215</sup>. UNRISD was created as part of the first UN Development Decade. Over the years UNRISD has undertaken significant work of relevance to the questions of innovation, development, intellectual property and its current activities reflect a continuing trend. One of UNRISD's current research programmes is on technology, business and society. The programme aims at examining the politics and economics of efforts to ensure that new technologies are used in socially responsible ways.

### *United Nations University (UNU)*

The UN University was established in 1973 to contribute, through research and capacity building, to efforts to resolve the pressing global problems that are the concern of the UN, its Peoples and Member States<sup>216</sup>. Operating as an academic institution, UNU has an extensive research community. Among its current key areas of focus are: development which covers topics such as globalisation and development; science, technology and society which covers topics such as innovation, software technology and food and nutrition; and governance which covers topics such as human rights<sup>217</sup>. There is also coverage of global public goods as a cross-cutting issue.

One of the research and training institutes under UNU is UNU/INTECH which is located in Maastricht in the Netherlands<sup>218</sup>. INTECH focuses on the role of new technologies and innovation in the development process. The current research of INTECH focuses on the following three areas: global governance of innovation; designing the knowledge economy; and innovation for development<sup>219</sup>.

<sup>210</sup> Personal communication with David Luke, UNDP, 27 July 2005.

<sup>211</sup> UNDP et al, 2003

<sup>212</sup> See Kaul et al, 2003

<sup>213</sup> See <http://www.unaids.org>

<sup>214</sup> The Guidelines are available at <http://>

[www.unaids.org/en/in+focus/hiv\\_aids\\_human\\_rights/international\\_guidelines.asp](http://www.unaids.org/en/in+focus/hiv_aids_human_rights/international_guidelines.asp). Last accessed on 30 July 2005

<sup>215</sup> See <http://www.unrisd.org/>

<sup>216</sup> See <http://www.unu.edu/>

<sup>217</sup> See <http://www.unu.edu/unu.html>

<sup>218</sup> See <http://www.intech.unu.edu/>

<sup>219</sup> Details of these programmes including publications are available at [http://www.intech.unu.edu/research/current\\_research/innovation/innovation.php](http://www.intech.unu.edu/research/current_research/innovation/innovation.php). Last accessed on 30 July 2005

# Other UN entities

## *Human Rights Bodies including the Office of the United Nations High Commissioner for Human Rights (OHCHR)*

The main UN human rights bodies and organisations include:

- a) The Commission on Human Rights (CHR) – the CHR was established in 1946 as the principal human rights forum to set standards for the conduct of States and to act as a forum to voice and address human rights concerns. The Commission has appointed some 40 human rights investigators – known as Special Rapporteurs – who monitor the enjoyment of human rights throughout the world. An example is the Special Rapporteur on the right to health;
- b) Human rights treaty monitoring bodies – each of the seven main human rights treaties have monitoring-bodies made up of between 10 and 21 independent experts who have the function of: monitoring compliance to the treaties by States parties; examining petitions by individuals alleging non-compliance by a State party; and, interpreting the provisions of the treaty. Examples include the Committee on Economic, Social and Cultural Rights (CESCR), the Human Rights Committee (HRC) and the Committee on the Rights of the Child (CRC); and,
- c) The High Commissioner for Human Rights – the High Commissioner, established in 1993 under General Assembly resolution 48/141, is the international human rights ombudsman with the responsibility for protecting and promoting all human rights for all. The High Commissioner is supported by the Office of the High Commissioner for Human Rights (OHCHR).

In the last decade, there has been a clearly discernible trend within UN human rights bodies to examine and explore the implications of intellectual property for the protection and promotion of human rights. For example, the High Commissioner in 2001 submitted a report on the “Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on the enjoyment of human rights”<sup>220</sup>. The Special Rapporteur on the right to health, Paul Hunt, undertook a mission to the WTO in 2003 which addressed the impact of the TRIPS Agreement and other WTO rules on human rights<sup>221</sup>. Since then, the Special Rapporteur has raised concerns about intellectual property protection with particular countries. For example, in 2004 and 2005, Mr Hunt reminded both the Peruvian and the US governments of their legal obligations in relation to the right to health in the context of negotiating a free trade agreement, including strong rules on patents, between the two countries<sup>222</sup>. In 2003, the Special Rapporteurs on globalisation and human rights also addressed the issue of intellectual property and human rights<sup>223</sup>.

In April 2005, the CHR adopted a resolution on the right of everyone to the enjoyment of the highest attainable standards of physical and mental health. Recalling the Doha Declaration on the TRIPS Agreement and Public Health, the CHR stressed<sup>224</sup>:

“The importance of monitoring and analyzing the pharmaceutical and public health implications of relevant international agreements, including trade agreements, so that States can effectively assess and subsequently develop pharmaceutical and health policies and regulatory measures that address their concerns and priorities, and are able to maximize the positive and mitigate the negative impact of those agreements, while respecting all international obligations applicable to them.”

The human rights treaty bodies have also been working on issues about the effect of intellectual property protection – and trade rules more generally – on the enjoyment of human rights. In their dialogue with individual States, the CESCR and the CRC have recommended on separate occasions that Costa Rica,

<sup>220</sup> See document E/CN.4/2001/13, available at [http://www.ohchr.org/documents/dpage\\_e.aspx?s=115](http://www.ohchr.org/documents/dpage_e.aspx?s=115)

<sup>221</sup> See document E/CN.4/2004/49/Add.1, available at [http://www.ohchr.org/documents/dpage\\_e.aspx?s=115](http://www.ohchr.org/documents/dpage_e.aspx?s=115)

<sup>222</sup> “US-Peru negotiations: Special Rapporteur on the right to health reminds parties of human

rights obligations”, Press statement, 5 July 2004; “US-Peru negotiations for a free trade agreement: Special Rapporteur on right to health reminds parties again of their human rights obligations”, Press statement, 15 July 2005

<sup>223</sup> See United Nations, “Globalization and its impact on the full enjoyment of human rights”, Report of the Special Rapporteurs on globaliza-

tion and human rights, J. Oloka-Onyango and D. Udagama, Sub-Commission on the Promotion and Protection of Human Rights, E/CN.4/Sub.2/2003/14. Available at [http://ap.ohchr.org/documents/dpage\\_e.aspx?su=11&s=60](http://ap.ohchr.org/documents/dpage_e.aspx?su=11&s=60). Last accessed on 29 July 2005

<sup>224</sup> See resolution E/CN.4/RES/2005/24, available at <http://www.ohchr.org>

El Salvador, Nicaragua, Ecuador and the Philippines take into account their human rights obligations when negotiating free trade agreements with the USA<sup>225</sup>. The HRC recently urged Uganda to adopt comprehensive measures to allow a greater number of persons suffering from HIV/AIDS to obtain adequate treatment. Although not specifically mentioned, it is considered that this meant the adoption, among other measures, of appropriate intellectual property rules and the use of TRIPS flexibilities.

In 2001, the CESCR adopted a statement on “Human rights and intellectual property”<sup>226</sup> and since then has been working on an explanation of the right to benefit from the moral and material interests resulting from scientific, literary or artistic production.

## The Convention on Biological Diversity (CBD)

The Convention on Biological Diversity (CBD) was adopted in 1992 under the auspices of UNEP when 150 government leaders signed it at the Rio Earth Summit. The Convention, which is administered by the CBD Secretariat, is dedicated to promoting sustainable development and was adopted as a practical tool for translating the principles of Agenda 21 into action<sup>227</sup>. In 1999, the Cartagena Protocol on Biosafety was adopted within the framework of the Convention to address issues related to biotechnology. The work related to the CBD is undertaken in the context of the Conference of Parties (COP), the Scientific Body, the Working Group on Article 8(j), the Working Group on Access and Benefit Sharing (ABS) and the Working Group on Review of Implementation.

The CBD at various COPs has been discussing issues relating to intellectual property. The Bonn Guidelines on Access and Benefit Sharing on the basis of which the Working Group on ABS has been mandated to elaborate and negotiate an international regime on ABS covers issues related to intellectual property. The Working Group on ABS is expected to carry out its work in collaboration with the Working Group on Article 8(j), which deals with indigenous communities’ issues. In this context, there has been a clear trend at the CBD to elaborate and consolidate an ABS regime as well as to explore the conditions under which the use of existing intellectual property rights can contribute to reaching the objectives of the CBD.

In addition to the work on ABS and related issues the CBD also has an extensive work programme on technology cooperation and transfer<sup>228</sup>.

## The World Intellectual Property Organisation (WIPO)\*

WIPO came into being in 1970 when the Stockholm Convention came into force, and subsequently a specialised agency of the UN in 1974<sup>229</sup>. Under the Agreement between the UN and WIPO, the UN recognised WIPO:

“[A]s a specialized agency and as being responsible for taking appropriate action in accordance with its basic instrument, treaties and agreements administered by it, *inter alia*, for promoting creative intellectual activity and for facilitating the transfer of technology related to industrial property to the developing countries in order to accelerate economic, social and cultural development, subject to the competence and responsibilities of the United Nations and its organs, particularly the United Nations Conference on Trade and Development, the United Nations Development Programme and the United Nations Industrial Development Organisation, as well as of the United Nations Educational, Scientific and Cultural Organisation and of other agencies within the United Nations system.”

WIPO currently administers 23 treaties including the WIPO Convention<sup>230</sup>. The various treaties can be divided into three main categories, namely:

- intellectual property protection treaties – treaties that define international substantive standards on intellectual property;

<sup>225</sup> 3D-Trade Human Rights and Equitable Economy, “United Nations Children’s Committee warns about FTA threats to affordable medicines and social services for the poor”, June 2005, <http://www.3dthree.org>

<sup>226</sup> United Nations, Human Rights and Intellectual Property. Statement by the Committee on Economic, Social and Cultural

Rights, 2001 (E/C.12/2001/15)

<sup>227</sup> See <http://www.biodiv.org>

<sup>228</sup> See <http://www.biodiv.org/programmes/cross-cutting/technology/>

<sup>229</sup> The Convention was signed in Stockholm on 14 July 1967 and has since been amended twice; on 28 September 1979 and in 2003. The

latter amendments are not yet in force. For details see WIPO document A/39/2, 24 February 2003, available at [http://www.wipo.int/documents/govbody/wo\\_gb\\_ab/doc/a\\_39\\_2.doc](http://www.wipo.int/documents/govbody/wo_gb_ab/doc/a_39_2.doc)

<sup>230</sup> For details of the various treaties and the contracting parties to each see, [www.wipo.int/treaties/index.html](http://www.wipo.int/treaties/index.html)

- global protection system treaties – treaties establishing procedural rules mainly aimed at ensuring that one international registration or filing of an industrial property will have effect in all the countries party to the relevant treaties; and,
- classification treaties – treaties which create classification systems aimed at organising information concerning inventions, trademarks and industrial designs through an indexed system.<sup>231</sup>

In addition, to these existing treaties there are current negotiations and/or discussions on a Draft Substantive Patent Law Treaty (SPLT), a proposed treaty on the protection of broadcasting organisations, a Trademark Law Treaty (TLT), and discussions on intellectual property and genetic resources, traditional knowledge and folklore which could result into a treaty or treaties on these issues falling in the first category of treaties described above.

Finally, starting at the WIPO General Assembly in 2004, there are on-going discussions on the establishment of a WIPO development agenda under which it has been proposed, among other things, to:

- establish a WIPO Standing Committee on Intellectual Property and Technology Transfer<sup>232</sup>;
- elaborate and negotiate a treaty on access to knowledge and technology<sup>233</sup>;
- formulate and adopt principles and guidelines for the development and implementation of technical assistance<sup>234</sup>;
- establish an independent WIPO Evaluation and Research Office (WERO)<sup>235</sup>;
- take measures to ensure wider participation of civil society and public interest groups in WIPO<sup>236</sup>;
- formulate and adopt principles and guidelines for norm-setting in WIPO and undertake evidence based “Development Impact Assessments” (DIAs)<sup>237</sup>;
- strengthen the strategic use of the intellectual property system including its flexibilities, for development, including the creation of a WIPO Partnership Programme<sup>238</sup>;
- commence exploratory work on defining and separating the WIPO Secretariat’s technical assistance and capacity building functions from norm-setting related functions<sup>239</sup>; and
- developing indicators and benchmarks for the evaluation of WIPO technical assistance<sup>240</sup>.

\* WIPO is a Specialised Agency

<sup>231</sup> For a description of these treaties see the WIPO website <http://www.wipo.int>. Also see Musungu and Dutfield, 2003

<sup>232</sup> See proposal by the GoFD, WIPO document WO/GA/31/11

<sup>233</sup> WIPO document WO/GA/31/11

<sup>234</sup> WIPO documents WO/GA/31/11 and IIM/1/4

<sup>235</sup> WIPO document IIM/1/4

<sup>236</sup> WIPO document WO/GA/31/11 and IIM/1/4

<sup>237</sup> WIPO document IIM/1/4

<sup>238</sup> See the proposal by the USA, WIPO document IIM/1/2

<sup>239</sup> WIPO document IIM/1/4

<sup>240</sup> WIPO document IIM/1/4

# Acronyms

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A2K	Access to knowledge	HRC	Human Rights Commission
ABS	Access and benefit sharing	IAC	WIPO Industry Advisory Commission
ACSTD	Advisory Committee on Science and Technology for Development	ICJ	International Court of Justice
CBD	Convention on Biological Diversity	ICT	Information and communications technology
CHR	Commission on Human Rights	ICTSD	International Centre for Trade and Sustainable Development
CIPIH	Commission on Intellectual Property Rights, Innovation and Public Health	IGCSTD	Intergovernmental Committee on Science and Technology for Development
CESCR	UN Committee on Economic, Social and Cultural Rights	IIM	Inter-Sessional Intergovernmental Meeting
COP	Conference of the Parties	ILO	International Labour Organisation
CRC	Committee on the Rights of the Child	ITPGRFA	International Treaty on Plant Genetic Resources for Food and Agriculture
CSTD	ECOSOC Commission on Science and Technology for Development	ITU	International Telecommunication Union
DIA	Development Impact Assessment	LDC	Least-developed country
ECA	UN Economic Commission for Africa	MDGs	Millennium Development Goals
ECE	UN Economic Commission for Europe	NGO	Non-governmental organisation
ECLAC	UN Economic Commission for Latin America and the Caribbean	OECD	Organisation for Economic Cooperation and Development
ECOSOC	United Nations Economic and Social Council	OHCHR	Office of the High Commissioner for Human Rights
ESCAP	UN Economic and Social Commission for Asia and the Pacific	PAC	WIPO Policy Advisory Commission
ESCWA	UN Economic and Social Commission for Western Asia	PCIPD	Permanent Committee on Cooperation for Development Related to Intellectual Property
EU	European Union	PCT	Patent Cooperation Treaty
FAO	Food and Agriculture Organisation	SCTT	Standing Committee on Intellectual Property and Technology Transfer
FTAs	Free Trade Agreements	SPLT	Substantive Patent Law Treaty
FTC	Federal Trade Commission (USA)	TACD	Trans-Atlantic Consumer Dialogue

TLT	Trade Mark Law Treaty		velopment Organisation
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights	UNODC	United Nations Office on Drugs and Crime
UK	United Kingdom	UNRISD	United Nations Research Institute for Social Development
UN	United Nations	UNU	United Nations University
UNAIDS	Joint United Nations Programme on AIDS	UNU-	
UNCTAD	United Nations Conference on Trade and Development	INTECH	Institute for New Technologies
UNDG	United Nations Development Group	USA	United States of America
UNDP	United Nations Development Programme	USPTO	United States Patents and Trademarks Office
UNEP	United Nations Environment Programme	WERO	WIPO Evaluation and Research Office
UNESCO	United Nations Educational, Scientific and Cultural Organisation	WFP	World Food Programme
UNFPA	United Nations Population Fund	WGTTT	WTO Working Group on Trade and Transfer of Technology
UNHCR	United Nations High Commissioner for Refugees	WHA	World Health Assembly
UNICEF	United Nations Children's Fund	WHO	World Health Organisation
UNIDO	United Nations Industrial De-	WIPO	World Intellectual Property Organisation
		WSIS	World Summit on the Information Society
		WTO	World Trade Organisation

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